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A NEW  
ABRIDGMENT OF THE LAW.

BY MATTHEW BACON,  
OF THE MIDDLE TEMPLE, ESQ.

WITH  
LARGE ADDITIONS AND CORRECTIONS,  
BY SIR HENRY GWYLLIM,  
AND  
CHARLES EDWARD DODD, ESQ.

AND WITH  
THE NOTES AND REFERENCES MADE TO THE EDITION PUBLISHED  
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## EXECUTORS AND ADMINISTRATORS.

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ACCORDING to the civil and canon law there are three persons who are called executors, and who have to do with the execution of a person's goods after his decease. The first is the ordinary, or bishop of the diocese, and he is called *executor lege a constitutus*. The second is *executor a testatore constitutus*, being appointed by the last testament of the party. The third is *executor ab episcopo constitutus*, who in the civil law is called *executor dativus*, and in our law an *administrator*.

Godolph. 75; Swinh. 205 b.  $\beta$  See for definition of executor, Bouv. L. D. h. t.; also, 3 Atk. 304; 2 P. Wms. 548; 1 Will. on Ex. 112.g

As the manner of appointing executors and administrators, and the nature and duty of their offices, have been matters of great debate and controversy in our law, it will be necessary to branch out this head into several divisions; and therefore we shall consider,

(A) What persons may be Executors: And herein,

1. *Of appointing the King Executor.*
2. *Whether Corporations may be Executors.*
3. *Who, in respect of their Crimes, are disabled from being Executors.*
4. *Who in respect of their Country.*
5. *Who in respect of their Want of Understanding.*
6. *Who in respect of their Fortune and Circumstances; and therein of obliging an Executor to give Security.*
7. *Of making Infants Executors.*
8. *Of a Feme Covert Executrix.*
9. *Of making Creditors Executors.*
10. *Of making Debtors Executors.*

(B) Of the different Kinds of Executors and Administrators: And herein,

1. *Of an Administrator durante minori ætate of an Infant Executor or Administrator: And,*
  1. Who may be such an Administrator.
  2. What Acts he may do.
  3. When his Authority determines.
2. *Of an Administrator de bonis non, where the first Administrator dies, or the Executor dies intestate, or without Probate of the Will: And,*
  1. In what Cases Administration *de bonis non* shall be granted, and to whom.
  2. What things unadministered such an one is entitled to.
  3. In what Actions commenced before his Time, may an Administrator *de bonis non* proceed.
3. *Of an Executor de son tort: And,*
  1. What Acts or Degree of Intermeddling will make an Executor *de son tort*.
  2. What Acts of his are as valid as if done by a lawful one.

## 6 EXECUTORS AND ADMINISTRATORS.

### (A) What Persons may be Executors.

3. How he is to be charged, and how far a subsequent Administration purges the first Wrong.

### β4. Of an Administrator *pendente lite*.g

### (C) Of the Manner of appointing an Executor.

1. *By what Words an Executor is constituted.*
2. *Of appointing an Executor absolutely, or on Condition.*
3. *Of appointing a temporary Executor.*
4. *Of appointing an Executor with a limited Power, as to administer such a Part of the Estate, &c.*

### (D) Of appointing Co-Executors: And herein,

1. *What Acts done by any one of them shall be as valid as if done by them all.*
2. *Where they must answer for each other's Acts; and what Remedy the one has against the other.*
3. *Where they must jointly sue and be sued; and therein of Summons and Severance.*

### (E) Of the Probate of Wills, and granting Administration: And herein,

1. *To whom the Probate of Wills and the granting of Administration did originally belong.*
2. *Of the King's Jurisdiction herein.*
3. *Of the Archbishop's Jurisdiction; and therein of bona notabilia: And,*
  1. *Of what Value the Goods and Effects must be, that will make bona notabilia.*
  2. *Of the Nature of such Goods as will make bona notabilia; and how far it is necessary that they should be in several Dioceses.*
4. *Of the Probate of Wills, and granting Administration by the Bishop of the Diocese.*
5. *Of the Probate of Wills, and granting Administration, where the Party dies within some peculiar Jurisdiction.*
6. *Of the Jurisdiction of some Lords of Manors in the Probate of Wills.*
7. *Of the Jurisdiction of some Mayors in respect of the Burgesses within such a Place.*
8. *The Form of proving a Will and taking out Administration; and therein of entering a Caveat.*
9. *Of the Executor's Refusal.*
10. *What Acts amount to an Administration, so that the Party cannot afterwards refuse.*
11. *Of bringing in an Inventory.*
12. *Where Administration unduly obtained may be revoked or repealed.*
13. *How far a Repeal makes all mesne Acts void.*
14. *What Things an Executor may do before Probate of the Will.*

### (F) What Persons are entitled to Administration.

### (G) In what Manner the Ordinary may grant it: And herein of granting it to one or more, or for a particular Thing.

### β(G2) Of the force and effect of Letters testamentary and Letters of Administration.g

### (H) What shall be deemed the Testator's Personal Estate, or Assets in the Hands of the Executor: And herein,

1. *What shall be such an Interest vested in the Testator, as shall go to his Executors.*
2. *How far Debts due to the Testator are Assets.*
3. *What shall be deemed his Personal Estate; and therein what Things shall go to the Heir, and not to the Executor.*
4. *What Things shall go to the Wife of the Deceased, and not go to the Executor.*
5. *Where, after Debts and Legacies paid, the Executors shall have the Surplus to themselves, or are to be Trustees for the next of Kin.*

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## (A) What Persons may be Executors.

- (I) How the Personal Estate, after Debts paid, is to be distributed when the Party dies Intestate: And herein of the Share the Husband or Wife are entitled to; of the ascending, descending, and collateral Line, and Admission of the Half-Blood; and where the Distribution shall be *per Stirpes*, and not *per Capita*.
- (K) Of Advancement, and bringing into *Hotchpot*.
- (L) What shall be a *Devastavit*, either in Executors or Administrators: And herein, of the Order of paying Debts and Legacies: And therein,
  1. *What Manner of Wasting will amount to a Devastavit.*
  2. *Where it will be a Devastavit to pay Debts of an inferior Nature before those of a superior; and the Order in which Debts are to be paid.*
  3. *Of paying Legacies before Debts; and therein of the Executor's Assent to a Legacy.*
  4. *What shall be allowed on account of Funeral Expenses.*
- [(L. 2.) Where the Personal Estate only shall be applied in Discharge of Debts, &c. And therein of marshalling the Assets.]
- (M) In what Cases an Executor may make himself liable *de bonis propriis*: And herein,
  1. *Where he shall be liable de bonis propriis by his false Pleading.*
  2. *Where by his Promise to pay or Discharge the Testator's Debts or Legacies.*
- (N) What Actions Executors or Administrators may bring in Right of those they represent.
- (O) How such Actions must be laid: And herein of joining a Matter in Right of the Testator, and in their own Right, in the same Action.
- (P) Of Actions and Remedies against Executors and Administrators: And herein,
  1. *Upon what Contracts or Engagements of their Testators or Intestates Executors or Administrators are liable.*
  2. *Of Personal Torts which are said to die with the Party.*
  3. *Of Remedies against Executors, or Administrators of Executors.*
  4. *Where they shall be excused from Costs.*
  5. *Where excused from putting in Special Bail.*

---

## (A) What Persons may be Executors: And herein,

### 1. *Of appointing the King Executor.*

It seems to be admitted, that the king may be (a) appointed executor; but, as he is presumed to be so far engaged and taken up with the public and arduous affairs of the kingdom, as not to have leisure to attend to the private concerns of any particular person; so the law allows him to nominate such persons as he shall think proper, to take upon them the execution of the trust, against whom all persons may bring their actions. Also, the king may appoint others to take the accounts of such executors.

4 Inst. 355; Godolph. 76. (a) Also my Lord Coke says, that it was assented in parliament, that the king might make his testament, and appoint executors, but he does not tell us of what. 4 Inst. 335.

Accordingly we find, that Katharine queen-dowager of England, mother of Henry VI., who died June 2, 1436, made her will, and thereof appointed Henry VI. sole executor, and that the king appointed Robert Rolleston keeper of the wardrobe, John Merston and Richard Alreed to execute the said will, by the oversight of the Cardinal, the Duke of Gloucester, and the Bishop of Lincoln, or any two of them, to whom such executors should account.

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(A) What Persons may be Executors.

### 2. *Whether Corporations may be Executors.*

It seems by (a) *Wentworth*, that (b) aggregate corporations consisting of divers persons cannot be executors. 1st, Because they cannot be feoffees in trust for the use of others. 2dly, Because they are a body framed for a special purpose. 3dly, Because they cannot come to prove a will, or at least to take an oath, as others do.

(a) Office of Executor, 17; vide *Ibid.* 25; 1 Bl. Comm. 477. But in the Year-book, 12 E. 4, 9 b, [there is an instance of a mayor and commonalty suing as executors, and no objection taken. Ro. Abr. 919. And it seems now, that any corporation aggregate may be executors, *Swinb.* p. 5, § 1; they may appoint certain individuals to be syndics, and to receive administration with the will annexed. 1 Bl. Comm. 28, n.] (b) But such corporations as may duly prove the will and take the oath of an executor, may be executors. *Godolph.* 85.

### 3. *Who, in respect to their Crimes, are disabled from being Executors.*

There are few or none, who, by our (c) law, are disabled, on account of their crimes, from being executors; and therefore it hath been always (d) holden, that persons attainted or outlawed may sue as executors or administrators, because they sue in *auter droit*, and for the benefit of the party deceased.

(c) How far by the civil and canon law heretics, apostates, traitors, felons, persons outlawed, incestuous bastards, famous libellers, manifest usurers, sodomites, uncertain persons, &c., are excluded from being executors, vide *Godolph.* 85; *Off. of Exec.* 17; *Swinb.* p. 5, § 2. (d) As in *Co. Litt.* 128; *Cro. Car.* 8, 9; *Ro. Abr.* 914, 915; *Vern.* 184. Outlawry no plea in bar.

Also, a villein (e) may be an executor, and the lord cannot seize those goods which he has to the use of the deceased; nay, where (g) a villein was made executor, he might sue his lord for a debt due to the testator.

(e) 18 H. 6, 4; *Ro. Abr.* 915. β It seems a person of colour cannot be appointed an administrator in Maryland. *Hoffman v. Gold*, 8 Gill & Johns. 79. g (g) 21 E. 4, 50.

But an (h) excommunicated person cannot be an executor or administrator; for by the excommunication he is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses.

But see stat. 53 G. 3, c. 137, § 3, and vol. iii. p. 652.

*Co. Litt.* 134; 43 E. 3, 13; *Theol.* 11; *Swinb.* 349; *Godolph.* 85. (h) Whether the statute 3 Jac. 1, c. 5, which enacts, that every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated, extends to disable such person from being an executor, vide 1 Hawk. P. C. c. 12, § 1, and *Off. of Ex.* 17, where it is said, that recusants convicted at the time of the death of any testator are disabled to be his executors; and 1 Show. 293, where the probate of a will was refused to an executrix, she being a papist convict, and the conviction exhibited into the spiritual court.

[By the 9 & 10 W. 3, c. 32, persons denying the Trinity, (i) or asserting that there are more Gods than one, or denying the Christian religion to be true, or the Holy Scriptures to be of divine authority, shall, for the second offence, be disabled to be executors.

|| (i) This act, so far as respects persons denying the Trinity, is repealed by the 53 G. c. 160, § 2.||

And by the acts for the qualifications for offices, persons not having taken the oaths, and performed the other requisites for qualifying, who shall execute their respective offices after the time limited for their qualifications shall be expired, shall be disabled to be executors.]

### 4. *Who, in respect to their Country, may be Executors.*

It seems agreed, that by our law an alien, or one born out of the allegiance of our king, may be an executor or administrator. Also, it hath been

## (A) What Persons may be Executors.

adjudged, that such a one shall have administration of leases as well as personal things, because he hath them *in auter droit*, and not to his own use.

Off. of Execut. 17; Sir Upwell Caroon's case, Cro. Car. 8. *β* An alien enemy may rightfully act as executor or administrator, if resident within the state, by permission of the proper authority, but not otherwise. Carthey v. Webb, 2 Mur. 268, S. C. 1 Car. L. R. 247. *g* But by the civil law, aliens cannot be executors, unless they are so appointed in military testaments; and the reason hereof is, that in such testaments respect is had only to the *jus gentium*. Godolph. 86.

But it hath been long (*a*) doubted, whether an alien enemy should maintain an action as executor; for on the one hand it is said, that by the policy of the law an alien enemy shall not be admitted to actions to recover effects, which may be carried out of the kingdom to weaken ourselves and enrich the enemy, and therefore public utility must be preferred to private convenience: (*b*) but on the other hand it is said, that those effects of the testator are not forfeited to the king by way of reprisal, because they are not the alien enemy's, for he is to recover them for others; and if the law allows such alien enemy to possess the effects as well as an alien friend, it must allow him power to recover, since in that there is no difference, and, by consequence, he must not be disabled to sue for them; if it were otherwise, it would be a prejudice to the king's subjects, who could not recover their debts from the alien executor, by his not being able to get in the assets of the testator. (*c*)

(*a*) Cro. Eliz. 142; Owen, 45; Vide tit. *Abatement*, B. 3. (*b*) Cro. Eliz. 683; Moore, 431; Carter, 49, 191; Skin. 370. (*c*) If the alien enemy's residence be abroad, or here, without the king's permission, express or implied, he seems to be disabled. Wells v. Williams, 1 Ld. Raym. 282; Brandon v. Nesbitt, 6 T. R. 23; Bristow v. Towers, Ibid. 35. ||

|| By st. 5 G. 3, c. 27, § 3, British artificers going out of the realm to exercise or teach their trades in any foreign country, who shall not return within six months after due warning given them, shall be incapable of being executors or administrators, and deemed aliens, and out of his majesty's protection. ||

### 5. *Who, in respect of their Want of Understanding, are disabled from being Executors.*

By our law, as well as by the civil law, idiots and lunatics are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them; but also by their insanity and want of understanding they are incapable of determining whether they will take upon them the execution of it, or not.

Godolph. 86.

Therefore it hath been agreed, that if an executor become *non compos*, the spiritual court may, on account of this natural disability, commit administration to another.

Salk. 36, pl. 1.

### 6. *Who, in respect of their Fortune and Circumstances, may be Executors: and therein of obliging an Executor to give Security.*

It seems to be now agreed, that the spiritual court cannot refuse to grant the probate of a will to a person appointed executor, on account of his poverty or insolvency; for, as he is but a trustee for the deceased, and such a person as the testator thought proper to appoint for that office, without any previous qualification, the refusing to admit him executor would be

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attended with these inconveniences: 1st, That though he has a temporal interest, yet he cannot sue for the debts of the testator before probate, which may be a considerable detriment to the testator's estate, and, consequently, to creditors and legatees. 2dly, That whilst this affair is in controversy, there will be neither executor nor administrator against whom an action may be brought to recover debts or legacies. 3dly, That if administration should be granted to another, it would be a good plea at law to an action brought by such a one, that there was a will and an executor appointed.

Salk. 36, pl. 1, 299, pl. 11; Carth. 457; Show. 293; Ld. Raym. 361.

Therefore, where to a *mandamus* to the judge of the prerogative court, to grant the probate of a will to a person named executor therein, the ordinary returned, that he was an absconding person and insolvent, and that he refused to give caution to pay legacies bequeathed to some of the testator's infant relations; a peremptory *mandamus* was granted; for the ordinary has no authority to interpose and demand caution of the executor, when the testator himself required none.

Carth. 457, *The King v. Sir Richard Raines*; Salk. 299, S. C., and there said, that there had been no precedents nor practice of this nature.

So, where after probate of the will the executor became a bankrupt, and there being a suit commenced in the ecclesiastical court to revoke the probate, and grant administration to another, the Court of King's Bench granted a prohibition.

Hill v. Mills, Show. 293; Salk. 36, pl. 1, S. C.; Skin. 299, S. C.

But an executor is considered only as a bare trustee in equity; and where he is insolvent, the Court of (a) Chancery will oblige him, as they will any other trustee, to give security before he enters upon the trust.

Carth. 458; Show. 294. (a) Where, during the litigation of a will in the spiritual court, the Court of Chancery, on suggestion that the person who claimed as executor under the will was insolvent, ordered that the debtors to the deceased's estate should forbear to pay any money till the matter was settled in the spiritual court. Chan. Ca. 75.

As where the testator bequeathed a legacy to J S, payable at the age of twenty-one years; on a bill, suggesting that the executor wasted the estate, and praying that he might give security to pay the legacy when due, it was decreed accordingly.

Chan. Ca. 121.

So, where the testator bequeathed a legacy to his child, an infant, payable at the age of twenty-three, and made his wife executrix and residuary legatee, and she married a second husband and died, and he took out administration *de bonis non* with the will annexed, (his wife being residuary legatee;) upon a suggestion of insolvency, the court decreed him to give security to pay the legacy when it should become payable.

Rous v. Noble, 2 Vern. 249.

|| So, where an annuity was bequeathed out of the personal estate; the executor having by his answer submitted it to the court, whether he should give security for the payment of it, and appearing to have expressed himself in words threatening to defeat it, and it being three years in arrear, the court ordered part of the personal estate to be set apart to secure it.

Batten v. Earnley, 2 P. Wms. 165.

And where a testator charged the residue of his personal estate with the payment of an annuity to his widow for her mother's life, which he plainly

## (A) What Persons may be Executors.

intended should be duly and quarterly paid; and the estate appeared to consist of some bonds or securities; the executors, though no misconduct was imputed to them, were ordered to bring before the master a sufficient part of the estate to preserve the annuity.

Slanning v. Style, 3 P. Wms. 334.

And wherever there are no debts, or the debts are all paid, and there is no purpose for which it is to be left outstanding, the present practice is to have the money lodged in court.

Blake v. Blake, 2 Sch. & Lefr. 26.||

[The Court of Chancery, too, will restrain an insolvent executor, and appoint a receiver, who may bring actions in the name of the executor for the recovery of the testator's effects. In like manner, it will restrain the assignees of a bankrupt executor from paying over the fund to him, and this, upon petition in the bankruptcy, from the peculiar authority it hath over them.

Utterson v. Mair; 4 Br. Ch. Ca. 270; 2 Ves. jun. 95, S. C. || No doubt, in the case of a bankrupt executor, where he becomes so in the lifetime of the testator, and it is clear that the testator did not advert to that circumstance, a receiver will be appointed, and the executor will be restrained. But it may be a question whether a person known by a testator to be a bankrupt, and yet appointed by him an executor, can be so controlled. Poverty alone, if known to the testator, would not, it seems, justify the taking of the administration of the property out of an executor's hands. Gladdon v. Stoneman; 1 Madd. Rep. 143; Howard v. Papera, Ibid.||

## 7. Of making Infants Executors.

An infant may be appointed executor, but he cannot administer till he is of the age of seventeen,(a) during which time administration is to be granted to some friend of his.

Godolph. 103; Off. of Exec. 208; (a) For this vide *postea*, letter (B), and the statute of 38 G. 3, c. 87, there set forth, which extends the administration till the age of twenty-one. βLetters of administration are granted to an infant, who receives and disposes of the assets of the intestate by virtue of such letters; an account cannot be directed in respect of his receipt during infancy. Hindmarsh v. Southgate, 3 Russ. 324.g

So, a child *in ventre sa mere* may be appointed, and if the mother is delivered of two or more children at the birth, they shall be all executors.

Godolph. 102; Off. of Exec. 213.

As to acts done by an infant in execution of the office of an executor, it seems agreed, that regularly all acts done by him in this respect, before the age of seventeen, are not binding; as, if he(b) sells the testator's goods,(c) assents to a legacy,(d) receives debts due to the testator, &c.

Off. of Exec. 213, 214; Godolph. 103. (b) That an infant executor before the age of seventeen cannot sell a lease for years, which he has in right of the testator, with an intent to pay the debts of the testator, and discharge the debts of the infant himself. Ro. Abr. 730.—But in Cro. Eliz. 254, it is holden, that an infant executor, at the age of thirteen, or other person by his order, may sell goods to pay debts.—And though sold for less than worth, yet the sale is good. 3 Leon. 143. (c) That an infant executor cannot assent to a legacy unless he hath assets to pay debts. Chan. Ca. 257. (d) Especially before the age of fourteen. Off. of Exec. 217.

But all things that an infant executor doth after he attains the age of seventeen, though before the age of twenty-one, if done according to the office and duty of an executor, will hold good and shall bind him, as paying debts, suing for and recovering debts, selling the testator's goods, &c.

Off. of Exec. 215, 216; Cro. Car. 490; Jon. 400; Moore, 852; And. 177; 5 Co. 27; Moore, 146.

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### (A) What Persons may be Executors.

But, if an infant executor, after the age of seventeen, but before the age of twenty-one, gives an acquittance or release for a debt or duty owing to the testator, such a release, without an actual payment to the infant, is (a) void; for if this should be construed good, it would be taking away the privilege which the law allows infants to avoid their acts, when they are apparently to their disadvantage; and this, which is in prejudice both to the infant and to the estate of the testator, cannot be said to be done according to his office as an executor.

5 Co. 27, Russel's case; Co. Litt. 172 a, S. P.; Off. of Exec. 285, S. C. Hence it is said, that though an infant may administer at seventeen, yet he cannot commit a *devastavit* till he is twenty-one. Vern. 328.—And the author of the Off. of Exec. 213, 214, inclines to think, that an infant's assent to a legacy, though after the age of seventeen, is not good, especially if it may subject him to a *devastavit*, as it may do when there are not assets sufficient to pay debts. (a) So, if a bond be forfeited, and the infant executor receive only the principal sum without the penalty, and give a general release of all the debt, this release at law is no bar of the penalty. Cro. Car. 490, Kniveton and Latham.—[The Court of Chancery will not direct money to be paid to an infant executor, though above the age of seventeen; but will refer it to a master to inquire whether there are any debts or legacies, and to consider of a maintenance. Campart v. Campart, 3 Br. Ch. Rep. 195.]

If an infant executor sues or is sued, he must regularly appear by his guardian, and not by attorney, for by law he is disabled to make an attorney; for if he suffers by the neglect or false pleading of his attorney, he has no remedy against him.

But for this vide tit. *Infancy and Age*, and where he may appear by attorney, being joined with others, who are of full age, vide Cro. Eliz. 541; Poph. 130; Cro. Ja. 441; Mod. 47, 298; 3 Bulst. 180; Vent. 102; Sid. 449; Lev. 299; 2 Saund. 212; Yelv. 130; Lev. 181; Cro. Eliz. 378; Carth. 122; Salk. 205, pl. 1; 4 Mod. 7.

### 8. Of a Feme Covert Executrix.

A feme covert may be appointed executrix, and in the spiritual courts she is considered as a feme sole, capable of suing and being sued without her husband; and therefore it seems, that according to their law she may take upon her the probate of the will without the assent of the husband, who hath no right to interpose or meddle in the affair.

Off. of Exec. 202; Godolph. 110.

But by our law, husband and wife are considered but as one person, and as having one mind, which is placed in the husband, as most capable to rule and govern the affairs of the family, and therefore the wife can do no act, which may prejudice the husband, without his consent and concurrence: hence the husband must be joined (b) in all actions by or against his wife; and, consequently, a wife cannot, by our law, take upon her the office of executorship, without the consent of her husband.

Keilw. 122; And. 117; Off. of Exec. 203. *β*A power to a *feme covert* executrix is duly executed by her without her husband. Tyree v. Williams, 3 Bibb, 367. *g* (b) [If, therefore, the husband be abroad, the Court of Chancery will restrain the executrix from getting in the assets of her testator, and appoint a receiver for that purpose, with power to commence suits for the recovery of debts due to the testator's estate. Taylor v. Allen, 2 Atk. 213.] *β*When a *feme sole* has been appointed executrix or administratrix, and she afterwards marries, the husband becomes a joint executor or administrator with her by virtue of the marriage. Barber v. Bush, 7 Mass. 510. *g*

Therefore, it seems, that if a wife, who is made executrix, is cited in the spiritual court to take upon her the executorship, and the husband appears and refuses his consent thereto, if afterwards they proceed to compel her, a prohibition will be granted.

Off. of Exec. 203.



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### (A) What Persons may be Executors.

Also, a wife cannot, against her consent, though her husband is willing, be compelled to take upon her an executorship; but, if the husband administers, she will be bound by it during the coverture.

Godolph. 109, 110.

So, if a wife administers, though against the consent of the husband, and an action is brought against them, they are estopped to say, that the wife was not executrix. ||Administration taken by the wife during coverture must be presumed to have been with the assent of the husband.

Godolph. 110; Adair v. Shew, 1 Sch. & Lefr. 243.||

So, if a feme sole be made executrix, and she marries before she intermeddles with the estate, and her husband administers; this is such an acceptance as will bind her, and she can never afterwards refuse it.

Bro. *Executor*; Godolph. 110.

It is said, that a feme covert executrix may, without the consent of her husband, make a will, and appoint an (a) executor as for those things which she hath as executrix, for she has them *in auter droit*.

Off. of Exec. 198, 199. But how far the husband's consent is necessary to make the will of a feme covert good, vide tit. *Devises*, letter (A). (a) May make her husband such executor. Godolph. 110.

### 9. Of making Creditors Executors.

A debtor may make his creditor executor, and in such case the executor may retain so much of the testator's assets as will satisfy himself: but this must be understood where the debt is in an equal degree (b) with those of the other creditors; for if he be a simple contract creditor, he cannot retain against a creditor by specialty, or any other of a superior nature.

12 H. 4, 21; Plow. 185; Hut. 128; Off. of Exec. 31; Godolph. 115; Salk. 304; Godb. 216; Hob. 10; Cro. Car. 372; Jon. 345; Keilw. 59; *Decker v. Miller*, 2 Paige, 149; *Chissum v. Dewes*, 5 Russ. 29; *Winter v. Hicks*, Tam. 475; *Pace v. Burton*, 1 McCord's Ch. 247; *Nunn v. Barlow*, 1 Sim. & Stu. 588; *Player v. Foxall*, 1 Russ. 538; *Lenoir v. Winn*, 4 Desaus. 65; *Langton v. Higgs*, 5 Sim. 228; *Livesey v. Livesey*, 3 Russ. 287, 542. Vide Bouv. L. D. voc. *Retainer*.g (b) {Sir William Blackstone founds the executor's right of retaining upon this; that he cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity. 3 Bl. Com. 18. But one executor shall not be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree; but both debts shall be discharged in proportion. Vin. Abr. tit. *Executors*, (D. 2).} {If a bond be given on marriage to trustees conditioned to leave or pay the obligor's intended wife a sum of money on his death, and she is made executrix, she may retain the amount. T. Raym. 483, *Roshelly v. Godolphin*; 2 Show. 403, S. C.; *Skin. 214*, S. C.; *Willes, 186*, *Marriott v. Thompson*. An executor may retain a debt due to him in trust for another; 3 Burr. 1380, *Plumer v. Marchant*; or to another in trust for him. 2 P. Will. 298, *Cockeroff v. Black*; 2 W. Black. 965; *Loan v. Casey*; 4 Ves. J. 763, *Franks v. Cooper*. *Contra*, *Willes, 186*, *Marriott v. Thomson*; but this was not the point on which the case was decided.}

So, if administration be (c) granted to a creditor, he may retain so much of the intestate's assets as will satisfy himself: but this also must be understood as to creditors in equal degree.

Godolph. 115; Off. of Exec. 31. (c) But an executor *de son tort*, who is a creditor, cannot retain, because this would be allowing him to take advantage of his own wrong. 5 Co. 30. *Caulter's case*. {2 Bl. Comm. 511. Yet if he afterwards takes out administration, he may show it, and then retain, 2 Vent. 180; though the administration be granted *pendente lite*. Stil. 337; Andr. 328.}

Also, such an administrator, who is a creditor by specialty, may bring an action of debt against one who possesses himself of the intestate's goods as

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executor *de son tort*, with an averment, that none of the goods came to his hands to satisfy the debt; for though he may bring trover or trespass against him as administrator, yet as against a stranger he is not deprived of this other remedy; for the reason why the debtor's making the creditor executor, or his taking out administration, is said to suspend or extinguish the action, is on supposition of assets.

Ashby and Child, Ro. Abr. 940; Stile, 384, S. C. adjudged *nisi*.

So, if there are no assets, he may sue the (a) heir of the obligor, where the heir is bound.

Salk. 304; Ro. Abr. 940. (a) So, if a creditor is made executor with others, he may sue the others, especially if he hath not administered. Off. of Exec. 32; Godolph. 125; and vide Cro. Car. 372; Jon. 345.

So, if A and B be jointly and severally bound to C, and A makes C his executor, or (as the case was) makes D his executor, who makes C his executor; in this case, if C has not received satisfaction of the assets of A, he may sue B; for, being jointly and severally bound, he may sue which of them he pleases, and though the debt be one, yet the obligations are several, and no assets appear of the value of the debt to retain, and there might be a judgment against which he could not retain.

3 Keb. Rep. 116; 2 Lev. 73, Coek and Cross.

[The bare appointment of a creditor to be executor, if he refuse to act, will not extinguish his legal remedy for the recovery of his debt.

Rawlinson v. Shaw, 3 T. R. 557.]

An executor sued for a debt of the testator cannot either plead as a specialty debt outstanding, or retain, a debt due from the testator to the executor (they having been partners) on an unliquidated partnership account, secured by a covenant from the testator to the firm; for this is not a debt due *at law*, and could not have been sued for at law.

De Tastet v. Shaw, 1 Barn. & A. 664; and see Moffat v. Van Millengen, 2 Bos. & Pull. 124 n.

In debt on bond against an administrator, if he plead a bond debt due to himself and retainer, he need not aver that it was given for a just debt, nor set out his administration; for the plaintiff admits him lawful administrator.

Picard v. Brown, 6 Term R. 550.

The executor of an executor is entitled to retain out of the balances of the produce of the original testator's West Indian plantations received by him as consignee appointed by the court, debts due from the testator to him either in his own right or as executor of the deceased executor.

Thompson v. Grant, 1 Russell, R. 540.

An executor on a bill for an account cannot call his co-executor to whom he has paid over money to prove it was duly applied.

Dines v. Scott, 1 Turn. & Russ. 358.

Where the defendant, acting under a power of attorney from the plaintiff, took out administration in Bengal to the estate of a deceased debtor by bond to the plaintiff, and received moneys under the administration; it was held that he could not recover as against the plaintiff on the ground of a subsequent administration obtained by other creditors in this country.

Farrington v. Clarke, 2 Chitt. 429.

*Quære*, Whether the heir of the obligor in a bond, being one of the two

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surviving executors of the obligee, is entitled to retain the amount of the bond out of the produce of the estate descended to him? If in a suit instituted by creditors he accounts for the produce of the real estate in the master's office, and he and his co-executors prove the bond debts under the decree, he is not entitled to retain.

Player v. Foxall, 1 Russ. 538.

### 10. Of making Debtors Executors.

It is laid down as a general rule, that if a creditor makes his debtor executor, it is an (a) extinguishment of the debt, for he cannot sue himself.

Ro. Abr. 920, 921; 5 Co. 30, in Needham's case; Off. of Exec. 30; Godolph. 113. (a) For being a personal action, and once suspended, it cannot be revived again. Hob. 10.  $\beta$  A debt due from the executor to the testator, is considered as cash in the hands of the executor. Hall v. Hall, 2 M'Cord's Ch. 304; Decker v. Miller, 2 Paige, 149; Farys v. Farys, Harp. Eq. R. 261.*g* || And the law is the same if the obligee in a joint and several bond make one of two obligors his executor with another; for the action being gone as to one must be gone as to both. Cheetham v. Ward, 1 B. & P. 630. ||—But though it is a discharge of the action, yet the debt is assets, and the making him executor does not amount to a legacy, but to payment and a release. Salk. 306, *per* Holt, Ch. Just.  $\beta$  The appointment of a debtor as executor, is not an extinguishment of the debt as against creditors or legatees. Wood v. Tallman, 1 Cox, 153; Bacon v. Fairman, 6 Conn. 121; Stevens v. Gaylord, 11 Mass. 256; Winthrop v. Bass, 12 Mass. 199; Hays v. Jackson, 6 Mass. 149; Page v. Patton, 5 Pet. 304; Executor of O. Bigelow v. Administrators of E. Bigelow, 4 Ohio R. 147.*g*

But, if a person dies intestate, and the ordinary commits administration to a debtor, the debt is not thereby (b) extinguished, for he comes into the administration by the act of law, whereas the other is the act of the party.

5 Co. 136; Salk. 306; Off. of Exec. 31. (b) And therefore if an obligor administers to the obligee, and makes his executor, and dies, the creditor of the obligee may well bring an action against him. Sid. 79.

If the debtee makes the debtor and another co-executors, and one of them makes his executor, and dies, the surviving co-executor shall not have an action to recover the debt against the executor of the debtor, because the debt was once extinct; for it could not be brought but in the names of both the co-executors, notwithstanding (c) one alone administered; and it could not be brought in both their names, because the debtor could not sue himself.

8 E. 4, 3; 20 E. 4, 17; Plow. 264; Leon. 320. (c) If the obligee makes the obligor and others his executors, and the obligor refuses, but the others administer, and the obligor dies first, yet the debt is released; for the obligor, notwithstanding the refusal, might have come in and administered, and the probate by the others was for his benefit. Salk. 308, *per* Holt.

So, where A being bound in an obligation to B, B makes A his executor, who administers several of the goods, but dies before probate of the will, and administration to B being granted to J S, he brought his action against the heir of A, but it was holden, that the debt was released in this case, though A never proved the will; for by administering as executor he was complete executor for this and several other purposes.

Wankford and Wankford, Salk. 299.

{One of two obligors in a joint and several bond being made executor of the obligee, the debt is extinguished as to both; for the voluntary discharge of one or a satisfaction made by one, discharges both. (d)}

21 E. 4, 81 b, cited 1 Bos. & Pul. 632, n. (d) 1 Bos. & Pul. 630, Cheetham v. Ward.}

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But all these cases of extinguishment by making debtors executors, must be understood where there are assets sufficient to discharge and satisfy the testator's debts and legacies.

Cro. Car. 373; Off. of Exec. 30; 2 Bl. Comm. 511, 512.

Therefore, where a debtor and another were made executors by the debtee, who by his will appointed, that out of the debt due to him they should pay a certain legacy, it was adjudged, that as to that legatee this debt was not extinct, but that it remained assets to pay legacies as well as debts; and this being a legacy, and properly recoverable in the spiritual court, the Court of B. R. refused to grant a prohibition to a suit for it there, and the rather in this case, because it was expressly devised to be paid out of the debt.

Flud. and Rumeey, Yelv. 160.

So, in a late case, where the testator bequeathed several legacies, and amongst the rest considerable ones to his two executors, to whom also he gave the surplus of his estate; and there being a debt of 3000*l.* due by bond to the testator from one of the executors, he insisted, that as there were sufficient assets to satisfy all the legacies, this 3000*l.* should not be brought into the surplus of the testator's estate, but that the same was extinguished for his benefit by his being made co-executor; and that though the surplus of the estate was given to them both, yet that this debt could not be taken to be part of that surplus, being before extinguished. It was decreed, that the (a) 3000*l.* should be taken as part of the surplus of the testator's personal estate, and both executors equally entitled to the same; for though in some books the testator's making a debtor executor is said to be an extinguishment of the debt, because an executor cannot sue himself; yet it was never doubted, but that such a debt remained assets to satisfy creditors, (b) and was also resolved to be assets to satisfy legacies; and this devise of the surplus and residue of the testator's estate being as much a legacy, and as well recoverable in the spiritual court, as any particular legacy, it was but fitting, that, since the courts of equity claim now a concurrent jurisdiction with the ecclesiastical courts in matters of this nature, there should be the same measure of justice in both these courts.

Selwin and Brown, decreed and affirmed in the House of Lords, 21 March, 1734, Cas. Temp. Talb. 240, S. C. (a) *Philips v. Philips*, Chan. Ca. 292; S. P. decreed. (b) || So, *Holliday v. Boaz*, 1 R. Abr. 920; Co. Litt. 264 b; *Askwith v. Chamberlain*, 1 Ch. Rep. 138; *Field v. Clark*, Ibid. 242; *Fox v. Fox*, 1 Atk. 463. A debt due by an executor to the estate of his testator is assets for the same plain reason for which an executor, who is a creditor, may retain; that he cannot sue himself. *Per Lord Eldon*, *Simmons v. Gutteridge*, 13 Ves. 264. In every case then under the usual decree against an executor, an interrogatory should be pointed to the inquiry, whether he has assets in his hands, arising from a debt due by himself. Ibid. For as he is bound to call in money out on personal security, so he must pay into court money due by himself. *Eagleton v. Coventry*, 8 Ves. 438. ||

|| Where a debtor to a testator was appointed executor, although without a legacy, yet, as it appeared by the tenor of the will, that the testator considered him in the light of a mere trustee of his whole property, the debt was clearly holden not to be discharged.

*Berry v. Usher*, 11 Ves. 87. ||  $\beta$  The testator appointed two persons who were indebted to him by bond, one as principal and the other as surety, as his executors: held that this was a release of the bond as to both, and that the amount thereby became assets in their hands. *Eichelberger v. Morris*, 6 Watts, 42. *g*

[A testator gave legacies to his brother and nephew, who were indebted

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to him in different sums, and made no disposition of the residue. Lord Thurlow said, he thought it had been a settled point in the Court of Chancery, that the appointment of the debtor executor, was no more than parting with the action; and declared it a trust for the next of kin.

Carey v. Goodinge, 3 Br. Ch. Rep. 110; Berry v. Usher, 11 Ves. 90, acc.]

If the debtee make the executrix of the debtor his executrix, and die, this is no extinguishment of the debt, because the executrix is entitled to the same, not in her (a) own right, but in the right of another.

11 H. 4, 83; Cro. Car. 372; Jon. 345. (a) But, if the obligee takes the obligor to husband; this is an extinguishment of the debt, because it would be a vain thing for the husband to pay the wife money in her own right. Co. Litt. 264; Salk. 306.— But, if the executrix of the obligee takes the obligor to husband, this is no extinguishment of the debt, for he may pay money to her as executrix; because if she lays the money so paid to her by itself, the administrator *de bonis non* of her testator (if she dies intestate) shall have that money as well as any other goods that were her testator's. Leon. 320; Moore, 236; Salk. 306.

Under this head of making debtors executors, it may be proper to observe, that if a debtor be in execution, and the plaintiff die, by which the right of administration descends upon the debtor; in this case he cannot be discharged upon a *habeas corpus*, because *non constat de personâ*; neither can he give a warrant of attorney to acknowledge satisfaction; and therefore it seems most advisable to renounce the administration, and get it granted to another, and then he may be discharged by a letter of attorney from such administrator.

Joan Bailie's case, 2 Mod. 315.

A debt due from an executor to a testator, is assets for the same reason that the executor of a creditor may retain, because he cannot sue himself.

Simmons v. Gutteridge, 13 Ves. 264.

An executor admitting a balance due from him to the testator upon an unsettled account, was ordered to pay the money into court, though there were debts of the testator outstanding; the testator had been dead three years.

Mortlock v. Leathes, 2 Meriv. R. 491.

Where the payee and holder of a promissory note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note even by a person to whom the executor has endorsed it.

Freakley v. Fox, 9 Barn. & C. 130.

## (B) Of the different Kinds of Executors and Administrators: And herein,

## 1. Of an Administrator durante minoritate of an Infant Executor or Administrator.

## 1. Who may be such an Administrator.

If one makes an infant his executor, or dies intestate, and the right of administration devolves upon an infant, in these cases, the ordinary is to grant administration during the minority of the infant, *i. e.* in the first case, till he arrives at the age of seventeen, (b) when by the civil law he may be executor, and in the latter till he arrives at the age of twenty-one, when only he is fit to be a trustee, because an infant cannot, before his full age, by the common law, give bond to administer faithfully.

Godolph. 102; 5 Co. 29. [Freke v. Thomas, 1 Salk. 39; 1 Ld. Raym. 667, S. C.; Ibid. 338, S. C. cited; Com. Rep. 110, S. C.; Ibid. 159, S. P.] || (b) But now by st. 38 G. 3, c. 87, § 6, where an infant is sole executor, administration, with the will annexed, shall be granted to the guardian of such infant, or to such other person as the

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spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him. § 7. And the person to whom such administration shall be granted, shall have the same powers vested in him, as an administrator now hath by virtue of an administration granted to him *durante minore etate* of the next of kin. Vide *Ex parte Sergison*, 4 Ves. 147, the circumstances of which case are considered as having been the immediate cause of this alteration in the law.]

And as such an administrator is but in nature of a curator for the infant in the civil law, and has no interest or benefit in the testator's or intestate's estate, but in right of the infant; it has been always holden discretionary in the ordinary to whom to grant it, and therefore it hath been frequently (a) adjudged, that he is not obliged within the statute 21 H. 8, c. 5, to grant it to the next of kin either of the deceased or the infant.

*Grandison v. Dover*, Skin. 155. (a) *Hob.* 250; *Vent.* 219; 2 *Str.* 892; *Ibid.* 956.

If A makes B his executor, and B makes C an infant executor, and letters of administration are granted to JS during the minority of C, JS cannot bring an action against a debtor of the first testator by virtue of this administration, nor hath he authority to meddle with his goods.

*Limner and Every*, Cro. Eliz. 211.

If an infant, and one of full age, are made executors, he who is of full age may take out administration *durante minoritate* of the infant, and may declare as executor or administrator *durante minoritate*, and there is no absurdity in this case, that there should be an executor and administrator to the same party, and this is only to enable him to sue alone.

2 *Lev.* 239.

[In suits *by* executors, some of whom are under age, they must all join, and may sue by attorney; but in suits *against* them, the infants cannot appear by attorney.]

*Smith v. Smith*, Yelv. 130; *Foxwith v. Tremain*, 2 *Saund.* 212; 1 *Mod.* 47, 72, 296, S. C.; 1 *Sid.* 449, S. C.; 1 *Lev.* 299, S. C.; 1 *Ventr.* 102, S. C.; *Raym.* 198, S. C.; *Frescobaldi v. Kinaston*, 2 *Str.* 783.]

### 2. What Acts he may do.

It seems to be agreed, that though an administrator *durante minoritate* hath but a limited and special property in the estate of the deceased, yet he may do all acts which are incumbent on an executor, and which are for the advantage of the infant and estate of the deceased; and therefore he may sell *bona peritura*, as a bailiff may, such as fat cattle, grain, or any thing else which may be the worse for keeping: so, he may (b) assent to a legacy, and may sue and be sued.

*Ro. Abr.* 910; *Owen*, 35; 5 *Co.* 29; *Cro. Eliz.* 718; *Godb.* 104. (b) But not unless there are assets to pay debts. 5 *Co.* 29 a.

But he cannot do any thing to the prejudice of the infant; and therefore he cannot sell the goods of the deceased any farther than they are necessary for payment of the debts, nor can he otherwise sell a term for years during the minority of the infant, for the words of his authority are, *administrationem omnium et singulorum bonorum ad opus, commodum et utilitatem executoris durante sua minori etate, et non aliter nec alio modo committimus*, &c.

5 *Co.* 29, S. C.; 2 *And.* 132; *Prince's case*, *Cro. Eliz.* 217; 2 *And.* 132; 3 *Leon.* 278, S. C.; and vide 6 *Co.* 67 b, in *Sir Moyle Finch's case*, a diversity taken, where administration is granted *durante minori etate executoris*, in such special manner as this case of *Prince's* is; and when such administration is granted in a general manner; for

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in the first case such administrator cannot make leases of any term vested in the executor, but in the other case he may, and they shall be good till the executor attain the age of seventeen, and until he enter.

If administration *durante minoritate* be granted to A, and afterwards repealed and granted to B, who obliges A to account to him, and afterwards gives him a release; this release will not bind the infant, for this does not appear to be for the benefit or advantage of the infant.

Ro. Abr. 910, 911.

If an administrator *durante minoritate* wastes the assets, the more proper way to charge him is by action on the case by the infant when he comes of age: also, by some opinions he may bring detinue against him for those goods which he still continues in his possession, or he may oblige him to account in the spiritual court, but cannot bring a writ of account against him at law; neither is he chargeable in any action at the suit of a creditor, after the infant comes of age; but such creditor may sue the infant, who has his remedy against the administrator.

Latch. 267; And. 34; Mod. 174; Sid. 567; 6 Co. 18 b.

If an administratrix *durante minori atate* of her infant daughter executrix, gives several bonds to the testator's creditors for their debts, and takes a second husband, the husband may retain, as his own, so much of the goods of the testator as amounted to the value of the debts paid and undertaken by the wife.

Hob. 250, Briers and Goddard; but a *quære* is added, How the case would be if the wife died, by which the husband would be no longer chargeable; and vide Raym. 484.

So, if an action be brought against a special administrator, and the administration determine pending the action, he ought to retain assets to satisfy the debt which is attached on him by the action. (a)

Comb. 465, resolved *per Holt*. (a) But this is on the supposition that the action does not abate in that event; which, it seems, would be the case. Ford v. Granvill, Moore, 462; Dub. Gouldsb. 136, S. C. adjudged; Lut. 342, S. C. cited as adjudged.

3. At what time the Authority of an Administrator *durante minoritate* determines.

It has been already observed, that there is an established difference, where administration is granted to one as guardian to an infant, who hath a right to administer, but is incapable to take it by reason of his minority, and where an administration is granted during the minority of an infant executor; that in the last case the administration determines as soon as the executor attains the age of seventeen years; (b) but in the other case it continues till the infant attains his full age.

5 Co. 29; Hob. 251; Cro. Eliz. 602; Cro. Car. 516; Carth. 446; Comb. 475; Salk. 39, pl. 1; Ld. Raym. 338, 667; Comy. Rep. 112, 159. (b) But see 38 G. 3, c. 87; *supra*, 434.

Also it seems agreed, that, if administration be granted during the minority of several infants, it determines upon the coming of age of any one of them; and it is laid (c) down by my Lord Coke, that administration granted during the minority of an infant executrix ceases upon her marriage.

(c) In Prince's case, 5 Co. 29.

But as this matter was fully debated in a late case, I shall here insert so much thereof as relates to this point.

One made his will, and thereby, after several specific and pecuniary legacies, gave and devised the residue and remainder of his personal estate

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to his four nieces, and made J S his executor, and died. The executor proved the will, and afterwards died intestate ; and thereupon administration *de bonis non et cum testamento annexo*, was granted to the plaintiff during the minority of the four nieces. The residuary legatee, one of the nieces, married a person who was of full age ; but she herself was an infant under the age of twenty-one years, though above seventeen ; and Sir Henry Johnson, in the year 1696, having given the testator a promissory note for the payment of 800*l.* and upwards, by his will in 1719, gave and devised all his real and personal estate to William Guidott, Esq., for the payment of his debts and legacies, and subject thereto, in trust for such child or children as the defendant, the Lord Strafford, should have by his lady, who was the only daughter and heir of Sir Henry Johnson, to whom he had been married about six or seven years ; and in the same year 1719, Sir Henry Johnson died. Mr. Guidott, the executor, renounced, and the Lord Strafford's children being infants of tender years, the Lord Strafford took out letters of administration *cum testamento annexo*, during the minority of his children, to Sir Henry Johnson ; and there being likewise a bond given by Sir Henry Johnson to the same person, for payment of a further sum of money, the plaintiff Jones brought an action of debt upon the bond in the Court of Exchequer, to which the defendant, the Lord Strafford, pleaded *solvit ad diem* ; and also by leave of the court pleaded further as a double plea, pursuant to the act for amendment of the law, that he had fully administered, *præterquam* such and such judgments to several persons, and that he had not assets *ultra* sufficient to pay and satisfy those judgments ; upon this plea the plaintiff Jones brings his bill for a discovery and account of assets, and the three nieces, who were infants and unmarried, and likewise the married niece, who was also an infant, and her husband, were co-plaintiffs in the bill. To this bill, which was not only for a discovery of assets of Sir Henry Johnson, but likewise for payment and satisfaction both of the bond debt, and likewise of the simple contract debt due on the note, the defendant, the Lord Strafford, put in a demurrer, which was, that by the plaintiffs' own showing in their bill it appeared, that one of the nieces was married, and therefore having a husband capable of acting for her, the administration granted to the plaintiff Jones, during the minority of the four infants, was determined : the question, therefore, was, Whether, one of the four nieces being married, and her husband of full age, the administration granted to the plaintiff Jones, during the minority of the four nieces, determined, though she herself was still under the age of twenty-one years ? It was agreed on all hands, that where an infant is made executor, and administration is granted during his minority, that such administration ceases *ipso facto*, when the infant attains the age of seventeen years ; and the opinion of Lord Coke, 5 Co. 29, in Prince's case, was cited, that so it would likewise, if such infant executrix, being under seventeen, should marry, because her husband was capable of acting for her ; and it was argued for the defendant, that if this were so in case of an infant executrix, there was the same reason for it in the present case, where one of the four nieces, during whose minority administration *cum testamento annexo* was granted, was married ; that it was agreed on the other hand, that whenever any one of the four nieces attained the age of twenty-one years, the administration ceased, and there was the same reason when one of them married and had a husband capable of acting for her ; that this was to be resembled to the case of a guardian at common law, and that if an infant feme married,



the guardianship was determined, because the husband was immediately on the marriage become her guardian; and it would be inconsistent that she should at the same time be under the power of another guardian; so here she, from her marriage, became under the care and guardianship of her husband, and he was capable of acting for her, and, consequently, the administration granted during the minority of the four was then determined in the same manner as if she had attained her age of twenty-one years; and then the plaintiff Jones, during the minority of the four, had no right to bring this bill, and that the demurrer was good; and for this were cited 5 Co. 29, Prince's case; 6 Co., Sir Moyle Finch's case; 1 Salk. 39, and that the only case against it was 2 Jon. 48; and they also cited the opinion of Twisden, J., 1 Vent. 103. But on the other side it was argued, and the court was clear of opinion, that the administration in this case did not determine by the marriage of one of the four nieces; they said, that it was by no means clear, even in the case of the infant executrix, that, if she married under the age of seventeen, the administration granted during her minority was thereby determined; that this was not the principal point in Prince's case, but only the opinion of, or an *obiter* case put by, my Lord Coke; that the same case was reported in Cro. Eliz. 718, 2 And. 132, and 3 Leon. 278, and there nothing said of it; that in the Office of Executors, supposed to be written by Justice Doddridge, the author much marvels at this opinion of the Lord Coke; that in the spiritual courts, where these administrations are granted, they take no notice of the husband, nor will in such case grant probate of the will or administration to him, but look upon the wife as to this purpose as a feme sole, and that the only power, which the husband hath in these cases, is derived to him from the common law, by which he is in many cases enabled to pay and receive, and to act for his wife; but the property of none of the goods or chattels, which the wife hath as executrix or administratrix, is vested in him; for if she survive, they likewise survive to her, and if she die first, there must be an administration *de bonis non* of her testator granted to another; and if this be so in the case of an infant feme executrix, that the administration granted during her minority does not cease by her marriage, much less in the present case; for here the administration is granted to the plaintiff Jones, *donec una earum quatuor vigesimum primum ann. ætatis attigerit*; so that, by the express words of the administration, it is not to determine sooner; and though it does then determine when any one of the four attains her age of twenty-one years, that is not the present case; for here, though she is married, yet she is still under twenty-one, and the husband has nothing to do with it: he, by his marriage, is not become next of kin to the testator, nor will the spiritual court grant administration to him; and if the marriage were to be a determination of the first administration, he could not succeed to it, for in that case the administration could only be granted to the wife; nay, they would not grant it to the husband and wife jointly; that the wife, in this case, was not entitled to the whole personal estate, as an infant executrix is, but only to her own undivided fourth part; and though the spiritual court may grant administration as to a particular thing, or in a particular place, yet they never grant administration as to an undivided third or fourth part of the same thing; for then who should bring the action for it, as of a horse, or other entire thing? The husband in this case would be entitled but to a fourth part of it in right of his wife; and must there be several administrations granted for one and the same thing? This would be absurd, as well

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to actions to be brought by them, as to actions brought against them; that if the administration is determined by the marriage, it will be to no manner of purpose to make an application to the spiritual court; they will not grant it to the husband, and the wife being still under age, they must grant it to some other person during the minority of herself and her three sisters, as it was before; and then it would be doing a vain thing to determine it: that the spiritual court by 31 E. 3, st. 1, c. 11, is to grant administration to the next of kin, which the husband is not in this case: that the law takes notice of an executor before probate, and he may do several things before probate; but the power of an administrator is derived to him only by the letters of administration; that if the husband has no right to claim the administration in this case, no more has the wife; for she being still under age as well as the other nieces, the court will grant administration to none of them; or, if they would, might grant it to any of the others as well as to her, it being in the discretion of the ordinary; and if the spiritual court should grant administration to the husband, it is not *de jure*, that he is entitled to it, but they may grant it to him as they would to any other person. The court, therefore, was of opinion, that Jones still continued administrator during the minority of the four nieces, notwithstanding the marriage of one of them, and that such administration did not determine till one of them came to the age of twenty-one years, and accordingly overruled the demurrer.

Jones v. Lord Strafford, Hill. 1730: Lord Chancellor, assisted by Lord Ch. J. Raymond, on pleas and demurrers; 3 P. Wms. 79, S. C.

Although it seems clear, that the authority of an administrator *durante minoritate* of an infant executor determines at seventeen, (a) and that of an administrator *durante minoritate* of an infant, who is entitled to administration, at the age of twenty-one, yet, if an action be brought against such an administrator, the plaintiff in his declaration need not aver, that the infant is still under those ages, for this is a matter more properly within the conscience of the defendant, and if his power be determined, he ought to show it; but he cannot object it, after he has taken issue on another point, which is an admission that his authority still continues.

Hob. 251; Cro. Ja. 590; 2 Ro. Rep. 209; 5 Co. 29 a; Ro. Abr. 910; Yelv. 128.  
(a) Not till twenty-one by st. 38 G. 3, c. 87, *supra*.

But it is (b) said, that if such an administrator brings an action, he must aver that the infant is still under age, because it is a matter within his conscience, and the thing that entitles him to the action; but in this case also it hath been (c) adjudged, that the defendant must take advantage of this omission, by way of plea or demurrer, and cannot object it after he has joined issue with him on another point, which admits the continuance of his authority.

(b) Hob. 51; Cro. Ja. 590; 2 Ro. Rep. 209; Ro. Rep. 400. (c) Cro. Car. 240.

But, if an action of debt be brought against an administrator generally, and the defendant plead in abatement, that administration was granted to him during the minority of his wife, he must aver that the wife is still living; for though he was a special administrator at first, yet, if his wife be dead, he may be administrator generally, as the declaration supposeth.

Comb. 465; Ld. Raym. 265; Carth. 432; Sparks v. Crofts.

It seems to be clearly settled, that if an administrator *durante minoritate* brings an action and recovers, and then his time determines, that the executor may have a *scire facias* upon that judgment.

Ro. Abr. 888, 889; Cro. Car. 227; 2 Brownl. 83; Godb. 104; Lev. 181; Keb. 750; Vern. 25.

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Also, it hath been holden, that if such administrator obtains judgment, he may bring a *seire facias* against the bail, and they cannot object that the infant is of full age ; for the recognizance being to the administrator himself by name, though he be administrator *durante minori ætate tantum* ; yet he may have a *seire facias* against the bail.

2 Lev. 37, Embrin and Mompesson ; but *per Hale*, in this case, if after the infant came of age he had sued out execution upon the principal judgment, it might have been a question, whether that ought to be sued out by him, or by the infant.

|| If judgment be obtained against such administrator, and afterwards the executor come of age, a *seire facias* will clearly lie against the executor on the judgment.

Sparks v. Crofts, *ubi supra*.

If a bill be filed by such administrator, and just before the hearing of the cause, the infant attain the age of twenty-one, a supplemental bill must be filed.

Stubbs v. Leigh, 1 Cox, 133.||

2. Of an Administrator *de bonis non*, where the first Administrator dies, or the Executor dies intestate, or without Probate of the Will. And herein :

1. In what Cases Administration *de bonis non* shall be granted, and to whom.

These kind of administrations are granted in the following instances :

1. If a person dies intestate, and administration is granted to J S, who dies without having administered all the intestate's goods, in this case the ordinary must grant administration of the goods unadministered to another ; for the first administrator cannot continue the trust reposed in him to his executor or administrator, because he has no interest but what he derives from the act of the ordinary.

Swinb. 396 ; Ro. Abr. 907 ; Vaugh. 182.

2. So, if an executor dies intestate, administration *de bonis non cum testamento annexo* of the testator must be granted by the ordinary, for they are not devolved on the administrator of the intestate, because he had them *in auter droit*, in order to discharge the trust reposed in him ; but, if the executor makes his executor, then the trust is devolved on him ; and after payment of the debts and legacies of the first testator, he has an absolute property in the goods.

Ro. Abr. 907 ; Vaugh. 182.  $\beta$ When lands are directed to be sold by the executor, the administrator *cum testamento annexo* cannot sell. Denn v. King, 1 Coxe, 432.*g*

$\beta$ An administrator *de bonis non cum testamento annexo* cannot maintain a writ of error to reverse a judgment recovered by the original executor.

Grout v. Chamberlain, 4 Mass. 611.

But such an administrator is not barred by a recovery of judgment by the original executor, because such judgment cannot be executed by the administrator, but is become ineffectual.

Grout v. Chamberlain, 4 Mass. 611.*g*

3. If the executor dies before probate, though he (a) administered in part by disposing of the testator's goods, &c., yet his executor cannot be executor to the first testator ; but in this case there is not an administration *de bonis non administratis* granted, but an immediate administration, because the executor died *ante onus executionis testamenti super se suscepium*, which is the foundation the spiritual courts proceed upon.

Ro. Abr. 907 ; Salk. 305 ; Dyer, 372. (a) Because the administering is an act *in*

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*pais*, of which the spiritual court cannot take notice; yet the acts done by the executor are good. 1 Salk. 308, *per* Holt.

4. So, if an executor (*a*) refuses, administration with the will annexed is to be granted to another.

Hensloe's case, 9 Co. 37. *β* M'Call v. Peachy's Adm'r. 3 Munf. 288; Brown v. Armistead, 6 Rand. 594; Simpson v. Hawkins, 1 Dana, 306.*g* (*a*) An executor may renounce but cannot assign over the executorship, because it is a personal trust. Vaugh. 182.—Also, where an executor before probate possessed himself of the goods, paid a debt, and converted some of the goods, and after, before the ordinary, refused; and upon such refusal the ordinary granted administration to the widow of the deceased; it was adjudged such administration was void, there being a rightful executor that had administered. Mod. 213, 14, Parten and Baseden's case; 1 Salk. 308, S. C. cited.

In these cases administration is to be granted to the next of kin to the first testator or intestate; but, if the testator appoints a residuary legatee, such legatee is entitled to administration.

Isted and Stanley, Dyer, 372 a; Show. 25; 3 Mod. 59; Vern. 200.

2. To what Things unadministered an Administrator *de bonis non* is entitled; *β* and for what he is liable.*g*

An administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for (*b*) years, household goods, &c., which remain *in specie*, and were not administered by the first executor or administrator, as also to all debts due and owing to the testator or intestate.

Salk. 306. (*b*) Whether an administrator *de bonis non* be entitled to an estate *per auter vie*, within the letter and meaning of the statute 29 Car. 2, c. 3; Carth. 376; *qu.* By stat. 14 Geo. 2, c. 20, § 9, distribution shall be made of estates *per auter vie*, whereof there is no special occupant, and which are undivided. *β* An administrator *de bonis non* can claim nothing but the goods of the intestate remaining *in specie*, unconverted and unchanged at the time of the death of the original administrator. Potts v. Smith, 3 Rawle, 361. See Allen v. Irwin, 1 S. & R. 549; Oldam v. Collins, 4 J. J. Marsh. 49; 5 Rand. 51; 3 Rand. 496; 9 Cowen, 320; 1 Gill & Johns. 270. But since the act of 1834, the administrator *de bonis non* may collect the assets in the hands of the administrators of the deceased administrator. Drenkle v. Sherman, 9 Watts, 485; Weld v. McClure, 9 Watts, 495. See Cocke v. Harrison, 3 Rand. 494; Coleman's Admr. v. Mundo, 5 Rand. 51.*g*

Also it is holden, that if an executor receives money in right of the testator, and lays it up by itself, and dies intestate, that this money shall go to the administrator *de bonis non*, being as easily distinguished to be part of the testator's effects, as goods *in specie*.

Salk. 306. *β* Miller v. Alexander, 1 Hill's Ch. R. 29; Hefferman's Admr. v. Grymes' Admr., 2 Leigh, 512.*g*

But, if A dies intestate, and his son takes out administration to him, and receives part of a debt, being rent arrear to the intestate, and accepts a promissory note for the residue, and then dies intestate; this acceptance of the note is such an alteration of the property as vests it in the son, and therefore on his death it shall go to his administrator, and not to the administrator *de bonis non*.

Barker and Talcot, decreed, Vern. 473.

|| An administrator *de bonis non* of the conusee of a statute had agreed with the conusor to assign it in consideration of a sum of money which upon that agreement the conusor was to pay to him, his executors or administrators, and then the administrator died. The court decreed the money to be paid to the executor of the administrator, and not to the new administrator *de bonis non*; although before the extent it could not be assigned at law.

*Sed nota*, adds the reporter, that there were no debts of the first intestate appearing.

Anon. 1 Vent. 362; Anon. Skin. 143; seems to be S. C., but thus differently reported.—One acknowledges a recognisance; the conusee makes his executor, and dies; the executor, before an extent, assigns the recognisance to J S, who pays the money to him. The executor dies and administration *de bonis non* is committed to the next of kin to the first testator, who sues for this recognisance. But Lord Keeper said, it was like the case where the testator is indebted to A, and B was indebted by bond to the testator, and then the executor assigns B's bond in satisfaction of the debt owing to A, that here the administrator *de bonis non* shall never recover on this bond; no more shall he in the principal case on the recognisance.

If a man possessed of a lease for years as executor of J D, agrees for a good consideration to assign it to J S, and after, before it is done, dies intestate, and J N takes administration of the first testator, he is not bound in equity to convey it according to the agreement of the executor, although the executor during his time had power to dispose of it at his pleasure; because the administrator comes paramount the agreement, and is to dispose of it for the soul, and for the payment of the debts of the first testator.

Wiseman v. Capel, Ro. Abr. tit. Chancery, (U).|| β An administrator *de bonis non* is not liable in an action on the implied warranty of soundness of a slave, the property of his intestate, sold by the preceding administrators under an order of sale from the ordinary. O'Neill v. Abney, 2 Bailey, 317.g

β The liability of an administrator *de bonis non* is restricted to the estate not administered.

Alsop v. Mather, 8 Conn. 584.g

If a bill of exchange is endorsed generally and delivered to A B as administrator of C for a debt due to the intestate, and A B die intestate after the bill became due, the bill vests in the administrator *de bonis non* of C, who may sue thereon; for the first administrator might have sued in his representative character.

Catherwood v. Chabaud, 1 Barn. & C. 150.

The administrator of an executor cannot sue for double value of lands held over after notice to quit under a demise from the testator, contrary to 4 G. 2, c. 28, without taking out administration *de bonis non*; and this, although the tenant has attorned to the administrator.

Tingrey v. Brown, 1 Bos. & Pull. 310.

In *assumpsit* brought by the administrator *de bonis non*, the promise may be laid to have been made to the first administrator.

Hirst v. Smith, 7 Term R. 182.

3. In what Actions commenced before his Time, may an Administrator *de bonis non* proceed.

If a feme executrix to J S takes a husband, and the husband and wife bring an action of debt upon an obligation in right of the wife, as executrix to J S, and they have judgment to recover the debt with damages and costs; if the wife dies, the husband cannot take out execution, for he is not entitled to the thing recovered, but it shall go to the succeeding administrator of J S, as the intestate's effects.

Ro. Abr. 889; W. Jones, 248.

But yet in these cases, though the administrator *de bonis non* was entitled, yet he could not sue out execution, because he was not privy to the judgment, and therefore was driven to a new action; but this being very inconvenient.

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By the (a) 17 Car. 2, cap. 8, it is enacted, "That where any judgment after a verdict shall be had by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment."

Yelv. 33, 83; Latch. 140; Palm. 443; 2 Saund. 149; Sid. 29. (a) Made perpetual by 1 Jan. 2, c. 17.

|| If the executor or administrator die after suing out the writ of execution, and before the return of it, the administrator *de bonis non* may within the equity of this act perfect the execution so begun; for the right in that case comes to him.

Clerk v. Withers, 6 Mod. 290; 1 Salk. 322, S. C.; 2 Ld. Raym. 1072, S. C.; 11 Mod. 34, S. C.

If, in such case, the sheriff return a seizure of goods to the value, but that they remain in his hands, *pro defectu emptorum*, the administrator *de bonis non* may sue out a *venditioni exponas*, or *distringas nuper per vicecomitem*.

Clerk v. Withers, 6 Mod. 290; 1 Salk. 322, S. C.; 2 Ld. Raym. 1072, S. C.; 11 Mod. 34, S. C.

And if at the time of the death of the executor or administrator the money be levied, it shall be brought into court, and the administrator *de bonis non* on producing the letters of administration shall be entitled to receive it.

Clerk v. Withers, 6 Mod. 290; 1 Salk. 322, S. C.; 2 Ld. Raym. 1072, S. C.; 11 Mod. 34, S. C.

But, if an executor sues a *scire facias* on a judgment or recognisance, and has judgment *quod habeat executionem*, and dies intestate; the administrator *de bonis non* must sue out a *scire facias* upon the original judgment, and cannot proceed on the judgment in the *scire facias*.

Treviban v. Lawrence, 2 Ld. Raym. 1049.

This statute extends only to judgments after verdict.

6 Mod. 296, 297.

On any other judgment obtained by the executor or administrator, the administrator *de bonis non* shall not have a *scire facias* for want of privity, but must resort to his remedy at common law by an action of debt *de novo* for the same demand, as administrator to the first testator or intestate.

Toll. Exec. 449; Com. Dig. Admon. (G). Levett v. Lewknor, Moore, 4; Yate v. Goth, Ibid. 680; Cro. Ja. 4, S. C. by the name of Yate v. Gough; Yelv. 33, S. C. by the name of Yaates v. Gough.

Yet even on a judgment by default, if the executor or administrator sue out execution and die when the goods are in the hands of the sheriff, and, consequently, the writ is completely executed; the administrator *de bonis non* shall have the money brought into court, and on showing the grant it shall be paid over to him.

6 Mod. 299, 300.

Or, if the judgment by default be for goods taken out of the executor's or administrator's own possession, his executor or administrator shall have a *scire facias* upon it, and account for them to the administrator *de bonis non*.

Yelv. 33; Com. Dig. *ubi supra*.||

### 3. Of an Executor de son tort: And herein,

1. What Acts or Degree of Intermeddling will make an Executor *de son tort*.

An executor *de son tort* is a person who, without any authority from the

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deceased or the ordinary, does such acts as belong to the office of an executor or administrator.

Swinb. 448, *post*; Off. of Exec. 171; Godolph. 90;  $\beta$ Mitchell v. Lunt, 4 Mass. 654. $\beta$  [What acts make a person so liable, is a question of law: whether proved or not, is for the consideration of the jury. 2 T. R. 97.]  $\beta$ In Ohio, an executor *de son tort* is unknown, the laws in that state not recognising such an executor. Dixon v. Cassell, 5 Ohio, 533.*g*

There are various acts which will make a man executor *de son tort*; such as possessing and converting the deceased's goods to a man's own use; (a) living in the house, and carrying on the trade of the deceased; (b) paying the deceased's debts out of his assets; suing for and receiving debts due to him; (c) and it is said, in general, that all acts of acquisition, transferring, or possessing of the deceased's estate, will make an executor *de son tort*, because these are the only *indicia* by which creditors can know against whom to bring their actions; and an administrator is not liable for the goods converted by such executor till he has recovered them in damages.*(d)*

(a) 5 Co. 33 b, Read's case; Off. of Exec. 171; Godolph. 171.  $\beta$ One who receives a bill of sale of personal property from an intestate in his lifetime, and takes such property and sells it after his death, may be sued by a prior creditor as an executor *de son tort*. Allen v. Kimball, 3 Shepl. 116. A widow who continues in possession of her husband's goods and uses them as her own, may be sued as executrix *de son tort*. Hawkins v. Johnson, 4 Blackf. 21.*g* (b) Hooper v. Summerset, 1 Wightw. 16. (c) Dyer, 105, 157; Keilw. 59; Ro. Abr. 918; 2 Leon. 224; 3 Leon. 57. (d) Hob. 49.  $\beta$ But the mere ordering the funeral and appropriating a reasonable sum for that purpose, does not make the party an executor *de son tort*. Camden v. Fletcher, 4 Mees. & W. 378.*g*

Also a person may be executor *de son tort*, by releasing debts due to the testator; by paying legacies with the deceased's effects; by entering on a specific legacy without the executor's assent; by paying and discharging the deceased's mortgages with his money or goods; by delivering to the deceased's (e) wife more apparel than is suitable for her; or by answering as executor to any action brought against him; or by pleading any other plea than *ne unques executor*.

Godolph. 91, 92; Off. of Exec. 174; Ro. Abr. 918. (e) So, if the wife takes more apparel than is suitable to her degree, this makes her an executrix *de son tort*. Ro. Abr. 918.

So, if a person is appointed by the ordinary *ad colligendum bona defuncti*, though his acting in obedience to such authority will not make him an executor *de son tort*: yet, if he proceeds further, and sells *bona peritura*, &c., he becomes executor *de son tort*: so, if the ordinary had given him express authority to sell the goods, yet this would not free him from being executor *de son tort*, for the ordinary himself cannot give any such authority.

1C II. 7, 27; Ro. Abr. 918; Dyer, 256.

[So, if the servant of B sell the goods of C, an intestate, as well after his death as before, though originally by the orders of C, and pay the money arising therefrom to B, B may be sued as an executor *de son tort*.

Paget v. Priest, 2 T. R. 97.

So, if a person having intermeddled in the intestate's affairs, has money belonging to him in his hands at the time when an action is brought against him for a debt due from the intestate, he is liable as an executor *de son tort*.

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So, if a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time and in the meanwhile the debtor die, whereupon the creditor takes and sells the goods, he will be liable to be sued for the debts of the deceased as executor *de son tort*; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors.

Edwards v. Harben, 2 T. R. 587.]  $\beta$  An intermeddling for which there is a colourable right, will not make a wrongful executorship. Turner v. Child, 1 Dev. 25. See Norfleet v. Reddick, 3 Dev. 221.g

And by the 43 Eliz. cap. 8, it is enacted, "That all and every person and persons that hereafter shall obtain, receive, and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate, upon any fraud, or without such valuable consideration as shall amount to the value of the same goods or debts, or near thereabouts, (except it be in or towards satisfaction of some just and principal debt of the value of the same goods or debts, to him owing by the intestate at the time of his decease,) shall be charged and chargeable as executor of his own wrong; and so far only as all such goods and debts coming to his hands, or whereof he is released or discharged by such administrator, will satisfy, deducting nevertheless to and for himself allowance of all just, due, and principal debts, upon good consideration, without fraud, owing to him by the intestate at the time of his decease, and of all other payments made by him, which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm."

But, notwithstanding this, there are several acts which a stranger may do without running the hazard of making himself an executor *de son tort*; such as taking care of the deceased's (a) funeral, feeding his cattle, taking an inventory of his estate and effects, paying or discharging his debts or legacies with his own money, repairing his houses in decay, providing necessaries for his children, &c.; for these are to be esteemed offices of kindness and charity, and not such as involve him in an executorship.

Godolph. 95. (a) || If done as an act of charity and necessity. 4 Ves. 216. || That the expenses herein must be suitable to the deceased's estate and quality. Off. of Exec. 174. But it seems, that if the expenses of the funeral are defrayed out of the deceased's effects, the person who meddles herein is an executor *de son tort*. Skin. 274, pl. 2; Carth. 104.  $\beta$  A party who receives a debt due to the estate of a decedent, for the purpose of providing for the funeral, does not thereby become chargeable as executor *de son tort*, unless he receives a greater amount than is reasonable for the purpose, regard being had to the estate and condition of the deceased, which is a question for the jury. Camden v. Fletcher, 4 Mees. & Wels. 378.g

Also, here we must observe, that regularly there cannot be an executor *de son tort* when there is a rightful executor, or when administration has been duly granted; for if after probate of the will, or administration granted, a stranger gets possession of the deceased's goods, he is a trespasser to such executor or administrator, and may be sued as such.

5 Co. 33; Chan. Cn. 33; Salk. 313, pl. 19.  $\beta$  Tomlin v. Beck, Turn. & Russ. 438; Bacon v. Parker, 12 Conn. 212. But in Maryland there may be an executor *de son tort*, and lawful executor at the same time. Dorsey v. Smithson, 6 Har. & Johns. 61.g

But, if a stranger gets possession of the deceased's goods before (b) probate of the will, he may be charged as executor *de son tort*, because the lawful executor can be no further charged than for the assets that came to his hands.

5 Co. 33 b, Reed's case. (b) So, if before administration granted, a stranger gets



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possession of the deceased's goods, he may be charged as executor *de son tort*, unless he delivers the goods over to the administrator before the action brought; and then he may plead *plene administravit*. Salk. 313, pl. 19.

So, although there be a rightful executor who administered, yet, if a stranger takes the deceased's goods, and, claiming to be executor, pays or receives debts, or pays legacies, or otherwise intermeddles as an executor, he becomes an executor *de son tort*.

5 Co. 34 a.

As to those things on which a stranger enters and takes possession, and which will make him an executor *de son tort*, it is now clearly agreed, that a person may be an executor *de son tort*, by entering on a lease or term for (a) years, especially, if, according to the old books, he enters in right of the deceased, and does acts upon the land, which belong to the office of an executor or administrator; as ordering the deceased's cattle to be fed on the land, &c.: but if he enters generally, and does not act as an executor, by meddling with the intestate's goods, &c., he is then a disseisor, and not an executor *de son tort*.

Moore, 126, Kenrick and Burgess; Style, 407; 2 Mod. 174; Swinb. 390. (a) So, if a stranger enters into an estate *pur auter vie*, this makes him an executor *de son tort*; because by the 29 Car. 2, c. 3, such estate is made assets. Carth. 166.

But this matter will be best explained by inserting the two following modern resolutions.

In an action of debt in the *debet* and *detinet* against an executor upon a lease for years, it was found by special verdict, that the plaintiff leased to Simon Taylor, father of the defendant, for years, rendering 180*l.* *per annum* rent; that Simon died intestate, and the defendant entered and used the intestate's cattle, and fed them upon the land for three months, and that he fed the cattle with the intestate's hay upon the ground, and, three days before the rent became due, the defendant drove the cattle off the land, and afterwards took out administration of all but this lease; and whether he should be chargeable, or not, for the rent, was the question; and all the court were of opinion, and so gave judgment, that he should be charged. And in this case these points were resolved: 1st, (b) That the action was well enough laid in the *debet* and *detinet*. 2dly, (c) That an executor cannot waive a term, but shall be charged as far as he hath assets, though the rent be greater than the value of the land. 3dly, That administration may be granted by the ordinary for part, as in this case, administration granted, excepting the lease. 4thly, (d) That if an executor *de son tort* takes out administration, this does not purge the wrong so, but that a creditor may charge him as executor *de son tort*. 5thly, An executor *de son tort* of a term shall be chargeable for the receipt of the profits till there be a rightful executor or administrator to charge, as in Read's case, 5 Co. 34 a, after administration or probate, the stranger that meddles with goods shall not be chargeable as executor *de son tort*, (e) unless he, pretending and claiming to be administrator, pays debts and does other things as executor: now there being no rightful administrator of this term, it being excepted out of the grant of administration, the defendant by his meddling has charged himself as executor *de son tort* thereof.

Pasch. 31; Car. 2, in C. B., between Garth & Taylor. (b) According to the resolutions 5 Co. 31; Cro. Ja. 238; Bulst. 22, 23, Lord Rich and Frank; Cro. Ja. 546, 549, cont.; Cro. Car. 225, Smith and Norfolk. (c) According to Yelv. 103, Hawse and Webster; Cro. Ja. 549.—Though it is said in Bro. tit. *Waiver*, 10, in such a case, peradventure, he may waive; and so is 21 H. 6, 24 b; Bulst. 22. (d) According to Cro. Eliz. 102. Stubs and Rightwise. (e) And so is Hob. 49.

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In an action of waste, the plaintiffs declared that they made a lease to J S of a barn for thirty-one years, who died intestate, and that the defendant entered claiming *terminum prædictum* as executor, and committed waste by pulling down the said barn; and on demurrer it was urged for the defendant, 1st, That there could not be an executor *de son tort* of a term, for no man can qualify his own wrong, by alleging, when he enters generally, that he took only a particular estate; and therefore he must be a disseisor in fee. 2. Admitting there may be an executor *de son tort* of a term, yet there is no privity between the lessor and him, to charge him in an action of waste; for at common law, and also by the statute of Gloucester, waste lies only against tenant by curtesy, dower, for life or years, neither of which is this tenant; besides in this action the place wasted is to be recovered with treble damages, which will be an injury to the rightful administrator, as also to the creditors of the deceased. As to the first objection, the court was of opinion, that there might be an executor *de son tort* of a term; and as to a wrongdoer's qualifying his own wrong, the difference in these cases they said was, that where a person enters generally upon lands of which there is no term in being, there he cannot qualify his wrong, by saying that he claims only a particular estate, but must be a disseisor in fee: so, where there is a term in being, as in this case, he cannot enlarge his estate by claiming a fee, and it is no objection, that the lessor did not charge him as a disseisor, when he had it in his election to charge him either way; which is the distinction taken in the (a) books. As to the second objection, it was holden, that the want of privity was not material, and that since the statute of Gloucester, which is rather a remedial than a penal law, privity is not requisite, for waste will lie against the lord of a villein, who enters upon the land leased to the villein for life, or years: it will lie also against an occupant, who is a mere stranger, as well as against a special occupant, who comes in by the limitation of the lessor. So, if tenant for life commits treason, and the king grants over the estate, waste will lie against the grantee: so, if a reversion escheats, waste will lie for the lord; in all which cases there is no privity: and it would be a manifest injury to the lessor in this case, if he should be delayed of his action till administration is taken out. And as to the objection, that this will be an injury to the rightful administrator, the court held, that the rightful administrator might falsify the recovery; for a recovery against one, that has not right, shall not bind him that has; and after administration granted he is paramount the recovery, viz. from the death of the intestate.

3 Lev. 31, 35, Mayor and Commonalty of Norwich v. John; 3 Mod. 90, S. C. adjudged for the plaintiff in C. B. and affirmed in B. R.; 2 Show. Rep. 457. (a) As in 9 H. 6, 20 b; Dyer, 134, pl. 6, 14, 114, pl. 18.

As to the value of the things taken by a stranger, so as to make him an executor *de son tort*, it seems not to be material; and therefore where an action was brought against such an one, who pleaded *ne unques executor*, and it was found that a bedstead only came to his possession, he was charged with a debt of 60*l*.

Noy, 69; Gouls. 116.

So, where on a like plea it was found, that the defendant took only a Bible, he was charged with a debt of a hundred pounds.

Noy, 69, Offley's case, cited to have been 39 or 40 Eliz.  $\beta$ Receiving the intestate's goods from the widow, knowing them to be such, renders a party an executor *de son tort*. Sealby v. Powis, 1 Harr. & Woll. 2. See Samuel v. Morris, 6 C. & P. 620.*g*

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So, where the jury found that the defendant detained *bonam partem bonorum*, and sold them, though it was objected, that *bona pars* was very uncertain; yet the court held, that he should be chargeable, for he cannot detain any part; and if he does, let it be of ever so small value, he is liable as an executor *de son tort*.

Cro. Eliz. 472.

But in these cases, where the things are of a very inconsiderable value, it is said that there may be relief in equity, as where on a plea of *ne unques executor*, the plaintiff proved that a chimney-back came to the defendant's hands, or that the defendant took money for a pot of ale sold by the testator: in these cases the defendant was relieved in equity.

2 Vern. 147, 148.

If a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession, and on the debtor's death in possession the creditor sell them, he is liable as executor *de son tort* for the deceased's debts; for the debtor's remaining in possession made the bill of sale fraudulent against creditors.

Edwards v. Harben, 2 Term R. 587.

A person cannot be charged as executor *de son tort* while he acts under a power of attorney from one of several rightful executors, but if he continue to act after such executor's death, the authority is ended, and he may be charged as executor *de son tort*; and this although he act under the advice of another executor who has not proved.

Cottle v. Aldrich, 4 Maul. & S. 175.

An executor *de son tort* cannot discharge himself of an action brought by a creditor by delivering over the effects to the rightful executor *after action brought*.

Curtis v. Vernon, 3 Term R. 587, affirmed in C. S.; 2 H. B. 18.

A creditor receiving goods of an intestate from his widow, cannot protect his possession against the rightful executor, suing in trover, on the ground of such delivery being made by one acting as executor *de son tort*, where the delivery was not made *in a course* of administration, but was a single act of intermeddling.

Mountford v. Gibson, 4 East, R. 441.

2. What Acts of an Executor *de son tort* are as valid as if done by a lawful one.

An executor *de son tort* may do several acts which a lawful executor may do, and which shall be as binding as if done by a rightful executor.

Off. of Exec. 179.  $\beta$  When an executor *de son tort* sells the property and pays the debts, the rightful executor cannot disturb the purchaser. Hostler's Admr. v. Scull, 2 Hayw. 179.g

Therefore if he pays (a) just debts, and an action is brought against him by a creditor, he may plead *plene administravit*.

5 Co. 30. Off. of Exec. 180; Carth. 104; Sid. 76.  $\beta$  Glenn v. Smith, 2 Gill & Johns. 493.g (a) An executor *de son tort* shall be allowed, in equity, all such payments as were incumbent on the executor, according to the course of law; but as to payments made out of order and rule, which the law left the executor liable to, he shall not be allowed them, because to the prejudice of the executor. Chan. Ca. 33.—So, where a widow possessed herself of the personal estate as executrix, under a revoked will, and paid debts and legacies, but had no notice of the revocation; it was holden in equity, that she should be allowed those payments. Chan. Ca. 126, and vide Ro. Abr. 919.

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But, if an action of trover be brought by a rightful executor or administrator against an executor *de son tort*, he cannot plead payment of debts to the value, (a) &c., or that he hath given the goods, &c., in satisfaction of the debts, (b) because no man ought to obtrude himself upon the office of another; but yet upon the general issue pleaded, such payments shall be recouped in damages, [and if they amount to the full value, the plaintiff shall be nonsuited.]

Carth. 104; Skin. 274, pl. 2. [Bull. Ni. Pri. 48. (a) He may, perhaps, of such goods as he hath sold. Bull. Ni. Pri. Ibid. If the action be trespass, instead of trover, payment of debts to the value will go only in mitigation of damages. Ibid.] (b) For this would take from the rightful executor the liberty which the law gives him of preferring one creditor to another; nay, of preferring himself to other creditors who are in equal degree with him. Off. of Exec. 181.

Also, it is clearly agreed, and hath been solemnly adjudged, that an executor *de son tort* cannot retain any part of the deceased's effects, in satisfaction of a debt due to himself, either against a creditor whose debt may be inferior to his, or against the rightful executor or administrator; for if it were permitted every man to be his own carver it would occasion endless strife and confusion, and would in effect be allowing him to take advantage of his own wrong.

Coulter's case, 5 Co. 30; Cro. Eliz. 630; Ro. Abr. 922; Moore, 527; Brownl. 103; Yelv. 137; Med. 208; Carth. 104; 2 Stra. 1106; Andr. 328, 356; 3 T. R. 590; 2 H. Bl. 26.

3. How an Executor *de son tort* shall be charged, and how far a subsequent Administration purges the first Wrong.

(c) An executor *de son tort* makes himself liable, as far as he hath assets, to all the debts due by the deceased, as also to his legacies, (d) and subjects himself to the action of the rightful executor or administrator, and may by his false plea (as, if an action is brought against him by a creditor, and he pleads *ne unques executor*, which is found against him) subject himself to the payment of the whole debt, though the goods which came to his hands be of ever so small value.

(c) 5 Co. 30; Hob. 49; Off. of Exec. β An executor *de son tort* is liable only in consequence of having intermeddled with the goods of the deceased, and only to the extent of his intermeddling. Ness v. Van Swearingen, 7 S. & R. 196; Stockton v. Wilson, 3 Penna. R. 130. g (d) Ro. Abr. 919. β Distributees cannot recover from one as executor *de son tort*. Vance v. Vance, 5 Monr. 521; Goode v. Goode, 2 Murph. 335. g

And though an executor *de son tort* does afterwards take out letters of administration, yet it is still in the election of a creditor to charge him as executor or administrator; for having (e) once made himself liable to the action as executor *de son tort*, he (g) shall never after discharge himself by a matter *ex post facto*.

Godb. 217; 3 Leon. 198; Cro. Eliz. 102, 365, 565, 810. β If there be a lawful executor, he may be joined in action with the executor *de son tort*. Stockton v. Wilson. 3 Penna. R. 130. g (e) So, if goods come to the possession of an administrator, and his administration is repealed, he shall be charged as executor of his own wrong. Mod. 63. (g) And there an executor *de son tort* cannot plead, that he is an administrator, though administration was actually taken out before the action brought. 2 Vent. 180, and vide 5 Mod. 145. β Though an executor *de son tort* cannot plead payment in bar of an action, by the rightful representative, yet he may, under the general issue in trover, give such payments in evidence in mitigation of damages. Saam v. Saam, 4 Watts, 432. See Rattoon v. Overacker, 8 Johns. 126. g

But this it is said must be so understood, that the defendant cannot by this plea abate the plaintiff's writ, by alleging himself administrator; but

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that yet to other purposes a subsequent administration purges the first wrong, and hath relation to the death of the party; as, if one possesseth himself of the goods of an intestate, and pays as much money as the goods are worth, and then takes out letters of administration; in this case he may plead *plene administravit*, and shall retain the goods in satisfaction of what he paid.

Ro. Abr. 923; Style, 337; Sid. 76; Raym. 58. § An executor *de son tort* may well plead *plene administravit*, although he does not take out letters of administration until after the commencement of the suit. *Andrew v. Gallison*, 15 Mass. 325, n. § [A person entitled to administration is opposed in the ecclesiastical court, and, *pendente lite*, being sued as executor, he pleads a retainer for a debt due to himself; to which the plaintiff replies, that the defendant is executor *de son tort*; the defendant rejoins, that letters of administration were granted to him *puis d'avein continuance*; this plea was holden good on demurrer, and judgment for the defendant. *Vaughan v. Browne*, 2 Str. 1106; And. 328, S. C.; 3 T. R. 588, S. C. cited. If H get the goods of an intestate into his hands, and administration be granted afterwards, he still remains chargeable as a wrongful executor, unless he deliver over the goods to the administrator before the action is brought, and then he may plead *plene administravit*. Per Holt, C. J. 1 Salk. 313. And he cannot avail himself of a delivery over of the effects to the rightful administrator after the action brought, though in fact no administration was granted at the time of its commencement; nor of the assent of the administrator to his retainer, so as to defeat the action of the creditor. *Curtis v. Vernon*, K. B., 3 T. R. 587. Affirmed in the Exchequer Chamber, 2 H. Bl. 18.—But, an executor *de son tort* is not liable, it seems, *de bonis propriis*, but only so far as he hath wrongfully administered the effects of the deceased. *Harris's Justin*. 87, n., cites 1 Mod. 213, 214; Swinb. 337, ed. 1743.] § When the estate is insolvent, though an executor *de son tort* pay voluntarily to some creditor double the amount of what he has received, it does not exonerate him from liability. *Neal v. Baker's Ex'r*, 2 N. H. Rep. 477. §

So, where an executor *de son tort* enters and takes possession of the goods, and sells them, and afterwards takes out administration, yet the sale is good by relation: but, if the intestate was entitled to a lease for years in reversion, and such an executor *de son tort* had sold the term, and afterwards had taken out administration, and then had sold it again to another, the second vendee must have enjoyed it, because there can be no executor *de son tort* of a reversion: besides, no entry can be made on a term in reversion.

*Kenrick and Burges*, Moore, 126. § But an executor *de son tort* cannot transfer the intestate's property by a sale. *Hostler v. Scull*, 2 Hayw. 179. §

If a widow takes possession of her husband's goods, and with the assent and direction of her son, sells thereof to the value of 400*l.*, and afterwards the son takes out administration and discharges all the debts of the intestate, not only to the value of this 400*l.*, but all the assets which the intestate died possessed of, and an action is brought against her by a creditor, she may plead *plene administravit*, and shall be discharged upon this evidence; for the action being brought against her after administration taken out, it is unreasonable that she should be liable (a) both to the creditor and administrator, or that creditors should have satisfaction for more than the party died possessed of.

*Whytmore and Porter*, Cro. Car. 88. (a) Where, in trover, against an executor *de son tort*, at *nisi prius*, before North, C. J., the question was, Whether goods having been taken in execution upon a judgment obtained against the defendant, by a creditor of the deceased, should discharge him against the plaintiff, who brought his action as administrator; and the opinion of the chief justice was, that this execution was a good discharge against another creditor that should sue him, to whom he might plead *riens en ses mains*; but it was no discharge against an administrator; for men must not be encouraged to meddle with a personal estate without right; but to prevent this mischief, where the party dies intestate, and there is contest about the administration, a man may procure from the ordinary letters *ad colligendum*. Vent. 349, 350.

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β An executor *de son tort*, to whom administration is afterwards granted, may repudiate an agreement made by him to surrender a term of years vested in the intestate.

Doe d. Hornby v. Glenn, 3 Nev. & M. 837; 1 Adol. & Ell. 49.

### 4. Of an Administrator *pendente lite*.

Administration *pendente lite* is one which is granted pending a suit commenced to test the validity of a paper purporting to be a will.

Administrators *pendente lite*, as such, have nothing to do with the contest, and cannot charge the expenses of it in their accounts.(a) They have no power to make distribution of the estate, nor pay legacies.(b)

(a) Dietrich's Appeal, 2 Watts, 332. (b) Ellmaker's Estate, 4 Watts, 34; Commonwealth v. Mattur, 16 S. & R. 416; Bradford's Adm'rs. 1 P. A. Bro. 87.

An administrator *pendente lite* is bound to pay debts to the extent of his assets.

Ellis v. Deane, 1 Beat. 5, 14.

Letters of administration *pendente lite* are at an end when the contest about the will has been terminated.

The State v. Craddock, 7 Har. & Johns. 40.7

(C) Of the Manner of appointing an Executor: And herein,

### 1. By what Words an Executor is constituted.

HERE we must first observe, that the appointing of an executor is an essential part of a will; for if a man makes several devises, &c., and appoints no executor, he dies intestate as to his(c) goods and chattels. But, though such a signification of the testator's mind as to the disposition of his goods, &c., be no more properly to be called a testament, than any deed wherein he expresses his mind to grant such and such things may be called a testament; yet it is not altogether of no force and validity; for since there is an expression of the testator's mind for the disposition of his goods in this or that manner; so far it shall be of effect, that the disposition shall be made according as he hath expressed his mind, and therefore shall administration be granted to the next of kin *cum codicillo annexo*, as it is when a perfect will is made, and an executor refuses.

Godolph. 76; Off. of Exec. 3; Noy, 12. (c) But, as to land, a will is good, though there be no executor named, for an executor hath nothing to do with lands and tenements which were not originally testamentary, but are made devisable by act of parliament. Off. of Exec. 3, 4.

On the contrary, the bare naming of an executor in the will, without giving any legacy, or appointing any thing to be done, is sufficient to make it a will, and as a will it is to be proved; for the naming of executors is by implication a gift or donation to them of all the goods, chattels, credits, and personal estate of the testator, and the laying upon them an obligation to satisfy the testator's debts to the just value of his goods and chattels.

Godolph. 82; Off. of Exec. 3.

But, although the appointing of an executor be an essential part of a will; yet it is not at all necessary that the testator should make use of the word *executor* in constituting him; for any words which show his intention that such a one shall be executor are sufficient; for a man's will, being supposed his last act, and made when he is *inops concilii*, is to receive a favourable interpretation.

Off. of Exec. 8; Godolph. 82, 83; Dyer, 90. [A testator desired certain persons to

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act as his executors, and gave one of them a legacy; the master of the rolls held, that the legatee, so appointed executor, could not claim his legacy without acting, or at least proving the will. Read v. Devaynes, 3 Br. Ch. Rep. 95.] {3 Ves. J. 148, Abbot v. Massie; 4 Ves. J. 212, Harrison v. Rowley; 9 Ves. J. 527, 531, Andrew v. Trinity Hall, Cambridge.}

Therefore, if the testator says, that he commits all his goods to the administration, or to the disposition of A B, in this case A B is as effectually made executor as if the testator had made use of the word *executor*: so, if the testator appoints that A B should dispose of the goods in his custody, he is thereby made executor of those goods; or if he says, *I make A B lord of all my goods*, or *I leave all my goods to him*, or *I make A B legatary of all my goods*, or *I leave the residue of my goods to him*.

Godolph. 83. β The use of the word *executor* is not indispensable. Carpenter v. Cameron, 7 Watts, 51. If, therefore, the testator direct that his book shall be given to A B, and that he shall receive all the debts due, and pay all the testator owes, this is a sufficient appointment of A B as executor. Fleming v. Bolling, 3 Call, 75. See also Browne v. McGuire, 1 Beat. 358.β

[So, if after giving several legacies, the testator appoint A and B *to receive and pay the contents*.

Pickering v. Towers, Ambl. 364.]

So, if the testator saith, *I will that A B be my executor, if C D will not*; in this case C D is appointed executor, and may if he pleases be admitted to the executorship, and exclude A B.\*

Godolph. 83. \*Sed qu. if A B should not be first cited, and refuse?

So, if the testator, supposing his child, his brother, or his kinsman to be dead, says thus in his will; *forasmuch as my child, my brother, &c., is dead, I make A B my executor*; in this case, if the person, whom the testator thought dead, be alive, he shall be executor.

Godolph. 83.

Also, if the testator, being asked by another, whether he doth make A B his executor, doth answer, *yea, I do*, or *what else*, or *why not?* or, *whom else should I make executor?* or, *I cannot deny it*, or other words to that purpose, *animo testandi*, this amounts to an assignation of A B executor.

Godolph. 83.

So, if the testator doth make A B or C D his executors; in this case they shall both of them be executors, for *or* shall be here construed *and*, rather than the party for this incertainty should be said to die intestate.

Godolph. 84.

But, if A be made an executor, and B a coadjutor, without more, he is not by this an executor with A, nor hath such coadjutor or overseer any power to administer, or to intermeddle otherwise than to counsel, persuade, and advise.

21 H. 6, 6; Off. of Exec. 9; Ro. Abr. 14.

It is said, that appointing him executor, who is named in such a note left with C D, is not a sufficient making of him an executor at all; but according to Godolphin, this must be understood, that it is no sufficient appointing of an executor to make it a written will, because the appointing of an executor is left out of the will; but surely it will be a good nuncupative will, if not a good written will; for why should not such an appointment be good in case where the testator had made a disposition by writing, as well as if he appoint an executor by word of mouth, where he hath made disposition by writing of his goods and chattels?

Godolph. 76.

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If one appoint my executor to be his executor, and die ; if the will be not void for incertainty, yet he is dead intestate until I die, and die testate : but if I die intestate, then he is dead intestate also.

Godolph. 78.

If there be demonstration in a will, that is only added as *descriptio personæ*, and that be false ; yet if the person be well enough known with it, that is sufficient ; as if the testator appoints his son Thomas, who was lately married, to be his executor, that is well enough, though he be not married.

Godolph. 85.

|| Testator named two persons as executors, with a legacy of 30*l.* each, conditioned on their taking upon themselves the trusts, and then said,—“ I give to my cousin J K 50*l.*, whom I appoint joint executor, and also to J K's sisters 50*l.* each ;” it was held, the legacy to J K was not annexed to, and depending on his taking the office.

Dix v. Reid, 1 Sim. & Stu. 237. ||

### 2. Of appointing an Executor absolutely, or upon Condition.

Any word in a will, that suspends the assignation of an executor in expectation of some future events, makes the executorship conditional ; but, if the condition be contrary to the former part of the will, it is void ; as, if one makes his two executors, provided that one shall not administer, this is (a) void.

Off. of Exec. 10 ; Godolph. 40. (a) But a *proviso* that one shall not meddle during the other's life, is good ; and by this they shall be executors successively, and not jointly. Off. of Exec. 13.

A *condition* ought properly to relate to something in contingency, that may, or may not be ; for if it be subject to no contingency either in substance or circumstance, it is no condition ; as, if A makes B his executor, upon condition the sun rise ten days after his death, he is executor absolutely, for there is no contingency to suspend his being so. So, if the testator make A his executor, upon condition the testator's wife and daughter be alive at the time of the death of the testator, and he never had any daughter, the will is absolute, for there is nothing possibly to overthrow it ; and in such case, where there is nothing to be a contingency, the adding of a condition can be interpreted nothing but the making of an illicit grant. So, captious conditions, that are contrary to the dispositions made, are void, because they cannot be supposed to be made with any other design than that a man should avoid his own grant.

Godolph. 43.

Necessary conditions, either in respect of fact or law, are of no manner of force : for it is in vain to require that which must necessarily be. Impossible conditions in respect of law, persons, nature, or contrariety, are in themselves void, and therefore hinder not an executorship.

Godolph. 44.

If an executor is appointed upon condition that he gives security before such a day to perform the will, or before he takes upon him the administration, he must in those cases perform the condition before he is complete executor.

Off. of Exec. 11.

But in case of arbitrary conditions, the executor hath time, during his life, to perform the condition, and may enjoy the executorship in the mean



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time, unless the judge appoints a time for him to perform the condition in ; but, if the judge appoint time and place, and the executor do it not, then is the condition (a) broken, and the person intestate, and so administration is to be granted to the next of kin.

Godolph. 43, 78. (a) But though the executorship be determined, yet all acts done by such an executor in pursuance of his office, before such condition broken, are good. Godolph. 77.

### 3. Of appointing a temporary Executor, as for a limited Time, during the Absence of J S, &c.

The time may be limited when the executorship shall begin, and that either certainly or with reference to contingency ; for by our laws it is lawful for a testator to appoint his executor, either from a certain time, or until a certain time, and in the mean time administration may be committed to the next of kin, or to the widow ; and the acts done by such administrator cannot be (b) avoided by the executor afterwards ; and in this sense the same person may be said to die partly testate, and partly intestate, which by the strictness of the civil law is not allowable.

Godolph. 77. (b) Hob. 265, 266.

So, a person may appoint, that J S shall be executor till his son comes of age, or for any limited time he pleases.

Off. of Exec. 10 ; So, 3 Atk. 180.

### 4. Of appointing an Executor with a limited Power, as to administer Part of the Estate.

The testator may limit and divide the power of his executors (c) in the following manner : 1st, He may make A his executor for his plate and household stuff, B for his sheep and cattle, C for his leases and estates by extent, and D for the debts due to him ; or, 2dly, He may appoint A executor for his goods in the county of S, B for his goods in the county of N, and C for his goods in the county of H.

Off. of Exec. 12 ; Godolph. 78 ; Ro. Abr. 914. [(c) Yet *quoad* creditors, they are all executors, and as one executor, and may be sued as one executor. 19 H. 8, 8 ; Dy. 3 ; 32 H. 8 ; Br. Exec. 155 ; Cro. Car. 293.]

And though several executors are appointed with separate and distinct powers, yet is the will but one will, and needs only one probate.

Off. of Exec. 13.

But, if a person is made executor without any limitation or restriction, he cannot take out administration for part, but must renounce the executorship *in toto*, or not all.

Salk. 927, pl. 6.

Therefore if an executor has a term, and the premises are of less value than the rent reserved thereon : in an action brought against him in the *debet* and *detinet*, he must plead specially, that he has no assets, and that the land is of less value than the rent, and demand judgment, if he ought not to be charged in the *detinet tantum* ; and this will free him from being charged *de bonis propriis* ; for otherwise the premises shall be presumed to be of greater value than the rent.

Yelv. 103 ; Cro. Ja. 549 ; 5 Co. ; Hargrave's case, Mod. 185 ; Salk. 297, pl. 6, *post*.

## (D) Of appointing Co-Executors : And herein,

### 1. What Acts done by any one of them shall be as valid as if done by them all.

If a man appoint several executors, they are esteemed in law but as (d) one person, representing the testator, and therefore the acts done by any one

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of them, which relate either to the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all, for they have a joint and entire authority over the whole.(e)

Godolph. 134; Off. of Exec. 95; Ro. Abr. 921. *£* Gleason v. Lillie, 1 Atk. 28.*g* (d) Therefore all of them shall have but one essoign, either before appearance or after; because their testator himself, whose person they represent, could have no more. Godolph. 135. *£* Saunder's Heirs v. Saunder's Ex'rs., 2 Litt. 315; Ewing's Heirs v. Handley's Ex'rs., 4 Litt. 451; Hertell v. Van Buren, 3 Edw. R. 20; Edmonds v. Crenshaw, 14 Pet. 166.*g* [(e) The law is otherwise, it hath been said, with respect to administrators. Lord Bacon's Tracts, 162; Hudson v. Hudson. But see *contr.* Jacomb v. Harwood, 2 Ves. 265. See too, Touchst. 481, 485.] *£* A testator may appoint different executors in different countries, in which his effects may be, or different executors, as to different parts of his estate, in the same country. Hunter v. Bryson, 5 Gill & Johns. 483.*g*

Hence it hath been adjudged, that if the testator dies possessed of a lease for years, and having named two executors, one of them grants all his interest to a stranger, that the whole term passes, for each had an (a) entire authority and interest different from other jointenants.

Dyer, 23 b, pl. 146; Cro. Eliz. 347. (a) So, if one executor releases a debt, it is good, and shall bind the rest. 21 H. 7, 25 b; Dyer, 23 b, in margin.—So, if one executor surrenders a term; 28 H. 6, 3; Dyer, 23 b, in margin.—So, if one acknowledges a judgment on an action; 17 E. 3, 66; Dyer, 23 b, in margin.—So, if on a *quid juris clamat* one of them attorns, it shall bind them all. *£* A difference of opinion between two executors as to the propriety of converting the assets, at a particular period, followed by a demand made by one of them upon the other, to concur in effecting an immediate conversion, does not deprive the latter of the right to exercise his own discretion, nor render him liable for the loss which may arise from the delay consequent upon his declining to comply with the demand. Buxton v. Buxton, 1 Milne & C. 80.*g*

And for this reason it is holden, that if one executor grants or releases his interest in the testator's estate to the other, nothing passes thereby, because each was possessed of the whole before.

Godolph. 134. *£* Case v. Abeel, 1 Paige, 393.*g*

*£* The testator gave his two executors a joint authority to sell land, but no interest in the land: held that the deed of one passed nothing.

Halbert v. Grant, 4 Monr. 582; 2 J. J. Marsh. 204; 2 Litt. 109.

When the testator devises that land or slaves shall be sold, without saying by whom; the executors who qualify, and after the death of the survivor, his executors, shall exercise the power.

Dean's Heirs v. Dean's Exr., 7 Monr. 308.

In New York, it is held that a naked power to executors to sell does not survive at common law.

Osgood v. Franklin, 2 Johns. Ch. R. 1; S. C. 14 Johns. 527.*g*

Also, it hath been adjudged, that if an obligee makes two executors, and dies, and one of them delivers the obligation to a stranger in satisfaction of a debt due from himself, and dies, though the debt does not pass by the assignment, being a chose in action, and not properly assignable; yet by this delivery the party hath such an interest in the paper and wax, that he may justify the detainer in an action of detinue brought against him by the surviving executor.

2 Ro. Abr. 46; Kelsick and Nicholson, Dyer, 23 b, in margin, S. C.; Cro. Eliz. 478, pl. 8, and 496, pl. 15, S. C. adjudged by three judges against one.—[*Qu.* As to this determination, for the obligation was only evidence of the debt; and as the debt was not assignable, being a chose in action, and only a mere delivery, what interest could pass?]

¶ By 21 H. 8, c. 4, lands devised to be sold by executors may be legally sold by the executors who act without those who refuse to take upon them

## (D) Of appointing Co-Executors.

the office. The statute does not extend to the case of death of an executor. The devise must be to persons *as executors*; or at least the fund, when raised, must be distributable by them in that character; and at all events, the statute does not help a case where the conveyance purported to be executed by the five executors, but the execution of only three could be proved. But such a conveyance was good as to three-fifths, being a severance of the jointenancy.

Denne v. Judge, 11 East, 389; and see as to this stat. Gilb. Uses, by Sugden, 128, note; Bonifaut v. Greenfield, 1 Leon. 60; Cro. Eliz. 80; Mackintosh v. Barber, 1 Bing. R. 50.

An assignment of assets, and a judgment confessed to a creditor by one executor, are not available against the dissent of the other executors, on behalf of the creditors in general, at least while they remain executory.

Leopard v. Vernon, 2 Ves. & B. 51.

Where a legacy was by order directed to be paid to A B, who died, leaving executors, and one executor died, on application the court ordered the legacy to be paid to the surviving executors, without acquittance from the executor of the deceased executor.

Moodie v. Bainbridge, 6 Madd. 107; and see 3 Ves. & B. 72; Coop. R. 58.

An executor who is employed by his co-executor as his agent to sell an estate, which, under the will of the testator, the co-executor alone had power to sell, and who hands over the price of the estate to his co-executor, is not accountable for the misapplication of that price by the co-executor because he had no legal right to retain it, although, by the will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate.

Davis v. Sparling, 1 Russ. & M. 64.

β A testator directed his land to be sold as soon as convenient after his death, and authorized his executors to make a good and lawful deed for the same; all the executors died but one, who, fourteen years after the testator's death, made a sale: held that the authority did not survive, and that the sale was void.

Den v. McCann, 2 Pen. 438.

Two acting executors sold a freehold property, and to secure part of the purchase-money, took a mortgage in their joint names as executors, for the amount. Before the amount was required for distribution, one of them sold and assigned the bond and mortgage to a purchaser, and then misapplied the money and failed: held that the executors took the bond as trustees, and not in their capacity *qua executors*; and that the assignment by one was not sufficient to vest the right to those securities in the purchaser; and he was decreed to give them up to the *cestuis que trust*.

Hertell v. Van Buren, 3 Edwards, 20.

Two, of three administrators, may compromise a claim, and release a debtor to the estate, without the concurrence, and contrary to the express wish of the other.

Murray v. Blatchford, 1 Wend. 583.

## 2. Where they must answer for each other's Acts, and what Remedy the one hath against the other.

It is clearly agreed, that one executor shall not be charged with the wrong or *devastavit* of his companions, and shall be no farther liable than for the

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assets which came to his hands; and therefore where an action (*a*) was brought against two executors, and the jury found that the two and another were made executors, and that the third wasted the assets to the amount of 600*l.*, and died, and that only 16*l.* came to the hands of the two others; the court held, that they should be chargeable for no more than the 16*l.*, for that it was the testator's folly to trust such a person, which must not turn to the prejudice of the other executors.

Godolph. 134; Off. of Exec. 100. *β* An action was brought against two persons, the executors of a termor, for the use and occupation by them of the demised premises. It was proved that one of them had entered: held, that the entry did not enure as to both, so as to make them jointly liable *de bonis propriis*, in an action for use and occupation. *Nation v. Goyes*, 4 Tyr. 561. *γ* (*a*) *Cro. Eliz.* 318; *Hargthorp* and *Millforth* adjudged. *β* A co-executor is chargeable only for the assets which come to his hands. *Douglass v. Satterlee*, 11 Johns. 16. See *contra*, *Brotten v. Bateman*, 2 Dev. Eq. 115. *γ*

Also, it hath been holden in Chancery, that if there be two executors, and they join in a receipt, and one only receive the money, as to creditors, who are to have the utmost benefit of law, each is liable for the whole, though one executor alone might give a discharge, and the joining of the other was unnecessary; but as to legatees, (*c*) and those claiming distribution, who have no remedy but in equity, the receipt of one executor shall not charge the other, for the joining in the receipt is only matter of form; the substantial part is the actual receiving, and this only is regarded in conscience.

*Churchill v. Lady Hobson*, Salk. 318, pl. 26, per Harcourt, Chan. [1 P. Wms. 241, S. C. (c) This distinction is not made by the decree, nor hath it been adopted in later cases. Vide *Sadler v. Hobbs*, 2 Br. Ch. Rep. 117, and the decree in 1 Cox's P. Wms. 243. But in the case of *Gibbs v. Herring*, Pr. Ch. 49, it is stated to have been taken and allowed; but the editor of the last edition of that work hath not been able to discover any such case in the Register-book. The distinction, therefore, is, in truth, without authority.—Taking it without the distinction, the rule laid down in the text, as to executors joining in receipts, hath been generally admitted as established law. *Fellows v. Mitchel*, 1 P. Wms. 81; *Aplyn v. Brewer*, Pr. Ch. 173; *Leigh v. Barry*, 3 Atk. 584; *Ex parte Belehier*, Amb. 219; *Sadler v. Hobbs*, 2 Br. Ch. Ca. 116. But it hath been broken in upon by Lord Harcourt in the case of *Churchill v. Hobson*, *ubi supra*, and by Lord Northington in *Westley v. Clarke*, 25th June, 1759, reported in 1 Cox's P. Wms. 83, and Finch's edition of Pr. Ch. 173; and the master of the rolls (Sir R. P. Arden) hath expressly entered his dissent from it in its fullest extent, viz. that an executor, by joining in a receipt, shall *in all cases be liable*. *Scurfield v. Howes*, 3 Br. Ch. Rep. 94.] *¶* Lord Eldon, however, disapproves the relaxation of the rule, which has obtained in some later authorities, for, as he expresses himself, “a simpler rule never existed, than that if the executor acts without necessity he takes the power over the fund; and shall not say, he has not the power over it.” *Chambers v. Minchin*, 7 Ves. 198, 199; *Brice v. Stokes*, 11 Ves. 324, 325; *Lord Skipbrook v. Lord Hinchinbrook*, 16 Ves. 479.] [And it is clear from all the cases, that where, by *any act done* by one executor, any part of the estate comes to the hands of another executor, the former will be answerable for his companion in the same manner as if he had enabled a stranger to receive it. *Sadler v. Hobbs*; *Scurfield v. Howes*, *ubi supra*; 1 Cox's P. Wms. 241, note; *Gill v. Attorney-General*, Hardr. 314.] *β* *Williams v. Nixon*, 2 Beav. 472; *Munday v. Slaughter*, 2 Curt. 72; *James v. Frearson*, 1 Y. & C. 370; Appeal of Brown's Executors, 1 Dall. 311; *Vernon's Estate*, 6 Watts, 250; *M'Nair's Appeal*, 4 Rawle, 148; *Sterrett's Appeal*, 2 Penna. R. 421. *γ* *¶* *Ex parte Shakeshaft*, 3 Br. Ch. Rep. 197; *Doyle v. Blake*, 2 Sch. & Lefr. 231; *Chambers v. Minchin*, 7 Ves. 186; *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252; 16 Ves. 477; *Langford v. Gascoyne*, 11 Ves. 333; *Underwood v. Stevens*, 1 Mer. 712; *Joy v. Campbell*, 1 Sch. & Lefr. 341; *Hovey v. Blakeman*, 4 Ves. 596. But, where a co-executor, who proved the will, but had never acted, having received a bill by the post on account of the estate, transmitted it immediately to the acting executor, he was holden not to be responsible for the administration of the property. *Balchen v. Scott*, 2 Ves. jun. 678; 1 Sch. & Lefr. 341; *Bacon v. Bacon*, 5 Ves. 331. So, if A, interested in the fund, con-

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cur in authorizing B, one executor, to part with it to C, his co-executor, and it be wasted, B shall not be responsible to the extent of A's interest, but he shall be responsible to the other parties, who may be interested in the fund, if they did not acquiesce in his transferring it to C. *Brice v. Stokes*, 11 Ves. 319.¶

If A devises legacies, and makes B and C his executors, and B makes C and D his executors, and dies, and they possess themselves of the estate of A, they may be both charged in equity; for though in point of law the executorship survived to C, and D is not privy, yet the estate of A, in (a) whose hands soever, ought to be liable.

Chan. Ca. 57. (a) That a creditor may follow the testator's estate, into whose hands soever it comes, notwithstanding any assignment of it by the executor. 2 Vern. 75. ¶ As to the general power of an executor to dispose of the assets of his testator, and of legatees and creditors to follow the assets disposed of by him in the hands of third persons, see *Hill v. Simpson*, 7 Ves. 152.¶

One executor (b) cannot regularly sue another of his co-executors touching any thing relating to their testator's will, or that is within the power, interest, duty, or office of an executor.

Off. of Exec. 99; *Godolph.* 135. β An executor is not liable for laches in not enforcing the payment of a debt due from a co-executor, who becomes insolvent after the date of the will. *Clark v. Cotton*, 2 Dev. Eq. 51.γ (b) But may in equity, and compel him to account for a moiety, &c.; yet vide *Sid.* 33. β An executor who has a claim against the estate of his testator, depending on a *quantum meruit* only, may exhibit a bill in equity against his co-executor and legatees to have such claim established and fixed at a certain sum. *Baker v. Baker*, 3 Munf. 222.γ

But, if the residue of the personal estate, after debts and legacies, be devised to both the executors, one of them may sue the other in the spiritual court for a moiety, for this is in the nature of a gift or legacy to him, and he may bring trespass against the other executor, if he takes it out of his possession, or detainue\* if he detains it from him.

Off. of Exec. 99; *Godolph.* 135. \**Qu.* As to detainue, if a partition has not been made, so as to distinguish the plaintiff's share.

β An executor or administrator is not liable for the acts of his co-executor or co-administrator, unless for gross negligence or connivance.

*Lenoir v. Winn*, 4 Desaus. 65; *Evans v. Executors of Evans*, 1 Desaus. 520; *Roach v. Hubbard*, Litt. Sel. Cas. 235; *Sutherland v. Brush*, 7 Johns. Ch. R. 22; *Lee v. Sanderson*, 4 Sim. 28; *Knox v. Pickett*, 4 Desaus. 92; *South's Heirs v. Hoy's Heirs*, 3 Monr. 95; *Moore v. Tandy*, 3 Bibb, 97.γ

3. Where they must jointly sue and be sued; and therein of Summons and Severance.

As executors in representing the testator make but one person, they are all regularly to sue and be sued, ¶ although some have omitted to prove the will, or have renounced before the ordinary.¶

*Godolph.* 134; Off. of Exec. 95; Com. Dig. tit. *Abatement*, (E), 13, *Pleader*, 2 D. 1; 9 Co. 37; 1 Lev. 161. β One administrator cannot sue his co-administrator on a bond from the defendant to the intestate. *Simon v. Albright*, 12 S. & R. 429; nor can one of several executors, the others having renounced, maintain an action in his own name. *Bodle v. Hulse*, 5 Wend. 313.γ

But, if debt be brought against an executor, and he plead that J S is co-executor with him, and that he is not named in the writ, without averring that J S hath administered, the plea will be ill; for although when an executor sues, the defendant may plead another executor not named, without showing that the other hath administered, because he cannot know whether the other hath administered or not; yet, when an executor is sued,

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if he pleads another executor not named, he ought to go farther and say, that he has administered, for that lies in his own conscience.

Lev. 161; Swallow and Emberson, Sid. 242; Rawlinson v. Shaw, 3 T. R. 560; Alexander v. Mawman, Willes's Rep. 42.

Also, if an action be brought against one executor, where there are more, if that one executor do not plead the matter in abatement, but plead to the action, he shall never have the advantage of such a plea afterwards.

Carth. 61.

If two executors sue, and set forth themselves to be executors, and that they proved the will,† but upon the probate set forth it appears that one only proved the will, and the defendant pleads this in abatement, a *respondeant ouster* will be awarded, for both have the right in them; and he that did not prove may come in when he pleases, but cannot refuse during the life of him that has proved.

Salk. 3, pl. 6, Brookes and Stroud. † It is not necessary to say they prove the will; but it is sufficient for them to declare generally as executors, and make a profert of the letters testamentary, and the defendant must plead to the action: If the probate is called for on the trial, it will thereby appear that the plaintiffs are executors, named such by the testator himself.

If a man appoints two executors, there shall be summons and severance, because one of the executors may release; yet such a release is a *devastavit* in him; but if he will not proceed at law, it is no *devastavit* in him; and therefore, both executors being only trustees for the person deceased, they shall not be compelled to go on together: but, if one refuses, the other may bring his action in the name of both, and have summons and severance; for otherwise a co-executor might, by collusion with the debtor, and not proceeding, keep the other from recovering assets, and not create a *devastavit* in himself; but after such summons and severance he does not proceed for a moiety, but as representative of the testator proceeds for the whole the testator was entitled to, and shall have judgment only in his own name.

Cro. Car. 420; 2 Ro. Abr. 98; Off. of Exec. 96, 104.

Therefore if there are two executors, and they bring an action of debt, and one of them is summoned and severed, and the severed person dies, the writ shall not (a) abate.

Cro. Eliz. 652; Co. Litt. 139. (a) Not being a party, he could not sue out execution if he was alive. Off. of Exec. 105.

|| In equity, if two co-executors are plaintiffs, and one of them is excommunicated, the other may be severed, and the defendant shall answer him.

Toll. Exec. 457; Pr. Reg. in Chancery, 2d edit. 209.

In a suit by executors, the proceedings do not abate by the death of one of them.

Hinde's Pr. Ch. 47.||

If debt be brought against several executors, and one appear, and the other make default upon the grand distress, the court may proceed against him that appears; and if the plaintiff recover, judgment shall be against all the executors for the goods of the testator; and the 25 E. 3, st. 5, cap. 17, which gives a *capias* in debt, has been always construed within the equity of the 9 E. 3, st. 1, c. 3, so that if there be several executors defendants, and a *cepi* is returned as to one, and a *non est inventus* as to the rest, the plaintiff shall proceed against him that appears, and shall have

## (E) Of the Probate of Wills, &amp;c.

judgment against all ; for the default upon a *capias* is the same as upon the grand distress. *Ergo*, error must be brought by all.

Salk. 312, pl. 17, per Holt, C. J. ; 2 Ld. Raym. 870.

If one executor hath the possession of the testator's goods, which are taken from him, (a) both must join in an action (b) of trespass ; for the possession of one is the possession of the other ; and if one only should bring the action, and the other should release it, such release would be good.

(a) 19 H. 6, 65 ; 16 H. 7, 4 ; 3 Leon. 209, S. P. per Coke ; but in Godolph. 134, and Off. of Exec. 104, it is said, that if goods be taken out of the possession of one executor, he alone may maintain an action for the same, and that without naming himself executor ; for which is cited 38 E. 3, 9. (b) But, if one executor alone sells the goods of the testator, he alone may maintain an action of debt for the money. Godolph. 135 ; Off. of Exec. 104.

It is said that executors, when sued, cannot plead distinct pleas, because they represent but one person, who could have but one plea, if he was living ; but it is said to be holden by others, that executors may plead distinct pleas, and that shall be tried which is (c) best for the testator, and most peremptorily to settle the controversy.

Off. of Exec. 98 ; Godolph. 136. (c) So, if two executors have judgment, and the one prays a *capias*, and the other a *fieri facias*, the *capias* shall be awarded as best for the testator. Hob. 61, cited as the opinion of Cotismore in 7 H. 6, 6. § One administrator has no authority to confess a judgment against his co-administrator. *Heister v. Knipe*, 1 P. A. Bro. 319. §

## (E) Of the Probate of Wills, and granting Administration : And herein,

1. *To whom the Probate of Wills and granting of Administration did originally belong.*

It appears to have been a matter of great controversy, to whom the probate of wills and granting of administration did originally belong, and whether these were matters entirely of ecclesiastical cognisance : (d) but it seems to be now the better opinion, that the probate of testaments did not originally belong to the ecclesiastical jurisdiction, but to the respective lords of manors where the testator died, as all other matters did.

(d) Lyndw. 174, *in voc.* "*Approbatis*," says, that the jurisdiction of the ecclesiastical courts touching testamentary matters, is by the custom of England, and not by the ecclesiastical law.—Wilkins, 78 ; Lamb. Saxon Laws, 64, make it appear, that the bishop and sheriff sat together in the county courts ; and by the Saxon laws, which they give us, it plainly appears, that the probate of testaments was in the county courts.—Selden, Eadmerus, 197, gives us the charter of William the Conqueror, which first separated the ecclesiastical court from the civil ; but this charter does not mention matters testamentary, or the probate of wills, to be of ecclesiastical consuance ; but only says, that the crimes, that were to be prosecuted *pro salute animæ*, were to be of that consuance.—And therefore, according to Selden, Eadmerus, 168, the ecclesiastical jurisdiction did not prevail herein till the time of Richard II., at which time the clergy got the king to publish the law of William the Conqueror, and confirm the same, and that no matters of ecclesiastical consuance should be transacted in the county court ; this is the charter of 2 Rich. 2, Membrano, 12, No. 5, and is mentioned in Selden's Eadmerus, 168.—Henceforward the clergy had the whole jurisdiction of wills, because the county court could not receive the probate, and the king's court could not intermeddle with it, because by a charter in Henry I.'s reign, the king's tenants, who owed suit to it, were enabled to dispose of their personal estate for the good of their souls, and of this the clergy were thought to be the properest persons to take care. Plow. 179, in the case of Greys and Fox.—Hence, in Fitz. Abr. tit. *Testament*, 148, it is said by Fairfax, that it was but of late the church had the probate of wills, and he supposes that it was given to them by some act of parliament.—And in the 11 H. 7, Fineux asserts that the probate of wills did not belong to the spiritual court by the ecclesiastical law, but came to them by custom and usage :—and with these opinions my Lord Coke agrees in Henslow's case, 9 Co. 38, and on these foun-

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dations concludes, that when the will is proved in the ecclesiastical court, the court has executed its authority; for the executors are to sue in the temporal courts to get in the estate of the deceased.

But, however it might have been formerly, it is now certain that the spiritual court is the only court, except as herein after excepted, that has jurisdiction of the probate of wills, and, as incident to such jurisdiction, hath power to determine all those matters that are necessary to the authenticating of them. Hence it hath been adjudged, that if the seal of the ordinary appears to the probate, it cannot be suggested or given in evidence in the common law courts, that the will was forged,\* or that the testator was *non compos*, or that another person was executor; but it may be given in evidence, that the seal was forged, or the will repealed, or that there were *bona notabilia*, because these are not in contradiction to the real seal of the court, but admit the seal and avoid it.

Raym. 405, 406; Sid. 359; Noell and Wells, Lev. 235; Hard. 131; 2 Ro. Abr. 299. [1 Str. 481, 671; 12 Ves. 298. Hence also, payment of money to an executor who hath obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null, and administration be granted to the next of kin. *Allen v. Dundas*, 3 T. R. 125.] || But payment of money under probate of a supposed will of a living person would be void; because in such case the ecclesiastical court has no jurisdiction; the power of the ordinary extending only to the proving of wills of persons deceased. *Ibid.* 130. || [As a prisoner cannot be convicted of forging a will during the existence of the probate, *R. v. Vincent*, 1 Str. 481, it is the practice to postpone the trial till the spiritual court hath determined upon its validity. *R. v. Goodrich*, O. B. 1784, cited in 3 T. R. 126; *R. v. Rhodes*, 1 Str. 703.] {But see *The King v. Sterling*, Leach C. L. (3d ed.) 117; 2 M'Nal. 429; *The King v. Richardson & Carr*, 2 M'Nal. 450, and the *Duchess of Kingston's case*, 11 St. Tr. 201, &c.}

But, if the spiritual court do admit a will, but yet will not give the probate thereof to the executor, because he cannot give security for a just administration, the temporal courts will grant (a) a *mandamus*; for though they are to determine whether there be a will or not, yet if there be a will, the executor has a temporal right, and they cannot put any terms on him but what are mentioned in the will.

*Skin.* 299, pl. 2; *Salk.* 36, pl. 1, S. C.; *Comb.* 185, S. C.; 12 Mod. 9, S. C.; *Holt.* 305, S. C. (a) So, if they refuse administration to the next of kin; 5 Mod. 374, unless it be controverted by will alleged in spiritual court. *Vide infra*, (G).

As to the disposition of intestates' estates and granting of administration, it is plain, that by the (b) common law and before the statute of *Westm. 2*, cap. 19, the ordinary had the absolute disposal of intestates' estates.

*Ro. Abr.* 906; *Raym.* 497; *Salk.* 37, pl. 3. (b) But my Lord Coke thinks that this was granted them by some particular constitutions; and therefore says, that anciently the kings of England, by their proper officers, *solebant capere bona intestatorum in manus suas*, 9 Co. 36, &c., in *Henslow's case*. 3 Mod. 24.

And therefore, if a man died intestate, neither his wife, child, nor next of kin had any right to a share of his estate, but the ordinary was to distribute it, according to his conscience, to pious uses: and sometimes the wife and children might be amongst the number of those whom he appointed to receive it: however, the law trusted him with the sole disposition.

2 Inst. 399; *Plow.* 277; 3 Mod. 59.

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\* That is as to chattels, or personal estate; for with respect to real estate, if any question arises, the original will must be produced, and not the probate, which cannot authenticate the will as to real estate; and in such case the validity of the will may be called in question, and forgery, insanity of the testator, or any other matter that avoids the will, may be given in evidence.



The first statute, that abridged the power of the ordinary herein, was the statute of Westm. 2, or 13 E. 1, cap. 19, by which it is enacted, "That where a man dies intestate, and in debt, and the goods come to the ordinary to be disposed, he, *de catero*, shall satisfy the debts, so far as the goods extend, in such sort as the executors of such persons should have done in case he had made a will."

Before this statute, no action lay against the ordinary at the suit of a creditor, where the party died intestate, nor could the ordinary maintain an action against the debtor of the intestate; but, if he had seized the goods, he might bring trespass against any one who took them out of his possession.

Ro. Abr. 906; 8 Co. 135; Raym. 497; but for the alterations herein by several acts of parliament, vide *infra*, letter F.

### 2. *Of the King's Jurisdiction in granting the Probate of Wills and Administration.*

As all jurisdiction flows from the king, so he is said to be the supreme ordinary in this kingdom; and therefore where an action of debt was brought by an administrator, and the plaintiff declared of letters of administration granted to him *per Carolum regem*, without saying *debito modo*, yet this was holden good on demurrer, because the king hath universal jurisdiction here.

Allen, 53, Hobson and Wills; for this vide *Prerogative*.

But it is said, that if a person dies intestate, and without kindred, though the usual course is to procure the king's letters patent, and then the ordinary admits the patentee to administration; yet that this is not *de jure*, but rather out of respect; for the ordinary might originally have disposed of intestates' estates to pious uses; and the instance of some lords of manors having a jurisdiction herein, is not a proof to the contrary, they, originally, and not the king, had right to grant administration.

Salk. 37, pl. 3. [If the effects of an intestate vest in the king by a forfeiture for felony, and the ordinary grant letters of administration to A in consequence of a warrant from the king, and they run in the usual form, viz. "to pay debts," &c., though with this additional clause, "to the use of his majesty," A may be sued by the creditors, and shall not be permitted to impeach the letters of administration. *Megit v. Johnson*, Dougl. 542.]

### 3. *Of the Archbishop's Jurisdiction; and therein of bona notabilia.*

If a person dies, having goods in several (a) dioceses, the probate of his will, as also the granting of administration to him, belongs to the archbishop of the province in which the goods are.

Off. of Exec. 44; Ro. Abr. 908; Dyer, 305. ¶ This power is reserved in the statute of frauds and perjuries, 29 Car. 2, c. 3, § 24, by which it is provided, that "nothing in the said statute shall extend to alter or change the jurisdiction or "right of probate of wills concerning personal estates, but that the prerogative court of the Archbishop of Canterbury and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before in every respect; subject nevertheless to the rules and directions of the said act." And by st. 23 H. 8, c. 9, (which directs that persons shall not be cited out of their proper diocese,) it is enacted, "that the same shall not extend to the prerogative of the Archbishop of Canterbury for calling any person out of the diocese where he shall be inhabiting, for probate of any testament; nor shall be in any wise prejudicial to the Archbishop of York, concerning probate of testaments within his province and jurisdiction, by reason of any prerogative."¶ (a) So, where a man dies intestate, having lands in divers peculiars, the granting of administration does not belong to the ordinary of the diocese, but to the metropolitan of the province; for they are excepted out of

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the ordinary's jurisdiction. Lev. 78, per Twisden and Windham. [But where the deceased has goods within the diocese of York, and also within a peculiar in that diocese, two administrations shall be granted; for the archbishop shall not have his prerogative in such case, the peculiar being derived out of his jurisdiction. Cro. El. 718.]

So, if a person dies intestate beyond sea, and hath goods here, though but in one diocese, yet the archbishop is to grant administration.

Ro. Abr. 908.

So, if a man dies in one diocese, not having any goods there, but having *bona notabilia* in another diocese, this is (a) sufficient to entitle the archbishop to grant administration; because the ordinary where he dies is by law to take as great care of the intestate and his goods, as the other ordinary where the goods are.

Ro. Abr. 909. (a) By a canon, 1 Ja. 1, c. 92, if a man dies on a journey, the goods, which he had at that time with him, shall not cause his testament or administration to be liable to the prerogative court. Godolph. 71.

So, if a man dies having *bona notabilia* in the several provinces of Canterbury and York, the archbishop of each province shall grant administration according to the *bona notabilia* in their respective provinces; for they are two supreme jurisdictions, and neither can act in the other.

2 Lev. 86; Hard. 216; Salk. 39.

So, if a man dies intestate, having *bona notabilia* in England and Ireland, several administrations shall be granted, viz. by the archbishop of Canterbury, for the goods in his province, and by the archbishop of Dublin, for the goods in his; but this by (b) Rolle must be understood, where the party hath goods in divers dioceses in each of their provinces, or in the diocese of the archbishop; for otherwise it ought to be granted by the ordinary where the goods are, and not by the archbishop.

Dyer, 305, S. P. *per* Hale. {An administrator appointed in a foreign country will not be recognised here as such; but new letters of administration must be taken out. 1 Dall. 456, *Grame v. Harris*; 1 Cran. 259, *Fenwick v. Sears's Admsrs.*; 3 Mass. T. Rep. 514, *Goodwin v. Jones*. So an executor cannot maintain a suit by virtue of letters testamentary granted in a foreign country. 3 Cran. 319, *Dixon's Exrs. v. Ramsay's Exrs.* See 8 Ves. J. 44, *Lee v. Bank of England*; 2 Mass. T. Rep. 384, *Selectmen of Boston v. Boylston*; 3 Mass. T. Rep. 520. In some of the American decisions here referred to, letters of administration granted in another state of the Union are considered in the same light as if granted in a foreign country. But in Pennsylvania such letters are, by the construction given to a statute, a sufficient authority to an administrator to maintain a suit. 1 Bin. 63, *McCullough v. Young*; 4 Dall. 292, S. C.}

(b) Ro. Abr. 908.

If the archbishop commits administration, though there be no *bona notabilia*, yet such administration is not void, but only voidable, and shall stand till it is remedied by complaint of the inferior ordinary: but, if the inferior ordinary commits administration, and the superior also, supposing that there are *bona notabilia*, if there are none, then the first by the inferior is good; if there are, it is absolutely void.

5 Co. 30; Hob. 185; 8 Co. 135; Cro. Eliz. 6, 283, 456; Lev. 305; 7 Mod. 146; Godolph. 70, S. P., because the metropolitan hath jurisdiction in all places within the province.

The probate of every bishop's will, though he had goods but in his own jurisdiction, belongs to the archbishop of the same province.

4 Inst. 335.

### 1. Of what Value the Goods and Effects must be, that will make *bona notabilia*.

There appears to have been formerly diversity of opinions as to the value of the goods, which was necessary to make *bona notabilia*; some holding 10*l*.

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necessary, some 5*l.*, others 40*s.*, and by others even a penny was thought sufficient to make *bona notabilia*.

For these vide Ro. Abr. 909; Off. of Exec. 44; Godolph. 70. β A promissory note is *bona notabilia* where the debtor lives. *Thompson v. Wilson*, 2 N. H. Rep. 292.

But it is now settled as established by the 92 canon of Ja. 1, that goods amounting to the value of 5*l.* make *bona notabilia*.

Ro. Abr. 909; 4 Inst. 335; Off. of Exec. 45.

But by the said canon it is provided, that this shall not prejudice the jurisdiction of those dioceses where, by composition or custom, *bona notabilia* are valued at a greater sum, as in London, where by composition *bona notabilia* are to be to the value of 10*l.*

4 Inst. 335.

It is not necessary that the deceased should have goods to the value of 5*l.* in each of the several dioceses where his goods are dispersed; but, if he hath goods in any one diocese amounting to 5*l.*, besides that in which he died, these make *bona notabilia*.

Godolph. 69.

But, if his goods in the diocese where he died amount to 10*l.* or more, yet, if he hath not goods to the value of 5*l.* in some other diocese, these will not be *bona notabilia*.

Godolph. 69.

2. *Of the Nature of such Goods as will make bona notabilia, and how far it is necessary they should be in several Dioceses.*

If a man hath goods in one diocese to the value of 5*l.*, and a lease for years of that value in another, these make *bona notabilia*; for though a lease or term for years, according to the civil law, is not properly *bonum*, nor a thing (a) movable; yet it is a chattel, and as such must be pleaded.

Ro. Abr. 909; Godolph. 71. (a) But in case lands be devised to executors for payment of debts and legacies, these, though they become assets, will not make *bona notabilia*. Off. of Exec. 46.

Debts due to the deceased make *bona notabilia*, as well as goods in possession; but, if there be a bond of the penalty of 5*l.* for the payment of a less sum, and the same be forfeited; though according to the strict rules of law the whole penalty is forfeited, yet this does not make *bona notabilia*.

Godolph. 70; Off. of Exec. 46. ¶ And now by st. 4 & 5 Ann., c. 16, § 13, the penalty is saved on bringing principal, interest, and costs into court.]

Debts due to the deceased make *bona notabilia*, be they ever so desperate or difficult to be recovered; and therefore, it (b) seems that a debt due from the king, for which there is no remedy but by petition, makes *bona notabilia*.

(a) Off. of Exec. 46, left a *quære*.

As to debts making *bona notabilia*, we must further observe a distinction the law makes between debts by bond or specialty, and debts by simple contract, viz. (c) that debts by specialty are esteemed the deceased's goods in that diocese where the securities happen to be at the time of his death, though they were entered into in another, or though the debtor or creditor, at the time of entering into them, lived in a different diocese.

Godolph. 70, 71; Off. of Exec. 46; Ro. Abr. 909; Dyer, 305. (c) Therefore where a man died in Lancashire, which is in the diocese of the bishop of Chester, and had

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a bond in London, it was adjudged that administration as to this bond, ought not to be granted by the bishop of Chester, but by the bishop of the diocese where the bond was. *Byron and Byron*, Cro. Eliz. 472.

But, as to debts by simple contract, they, by our law, follow the person of the debtor, and are esteemed the deceased's goods in that diocese where the debtor resided at the time of the creditor's death.

Godolph. 70; Off. of Exec. 46.

On this distinction it hath been holden, that a judgment obtained in any of the courts of Westminster made *bona notabilia*, though the action upon which it was obtained was laid in Dorsetshire, because the record was at Westminster.

Carth. 149; 3 Mod. 324, S. C.; Gold and Strode, Salk. 40, pl. 9; 2 Salk. 679, pl. 7; 2 Ld. Raym. 851, and 6 Mod. 134, Adams and Savage, S. P., adjudged, where an administrator brought a *scire facias* against the tenants of Savage, on a judgment obtained by his intestate in B. R., and showed as his title, that administration was granted to him by the Archdeacon of Dorset, though the defendant, without taking advantage hereof, pleaded over; yet the court abated the writ *ex officio*; for they held, that they were obliged to take notice, that the place where they sat was not within the jurisdiction of the Archdeacon of Dorset; but that if the plaintiff had not been thus particular, but had declared on an administration generally, and the defendant taken no advantage of it, it had been well enough.

But, if an administrator takes out administration by an inferior ordinary, and on a *scire facias* has judgment to have execution on a judgment obtained by his intestate in B. R., and thereupon a *capias ad satisfaciendum* issues, on which the defendant is taken, and the sheriff suffers him to escape; the sheriff, in an action against him, cannot take advantage of this error, for the court had jurisdiction over the cause, and the judgment was only erroneous, but not void.

Carth. 148; 3 Mod. 324, the above authorities; Gold and Strode adjudged.

If a merchant in London draws a bill of exchange on his correspondent in Newcastle in favour of J S, and the bill is refused, and J S dies intestate, his administrator, on letters of administration taken out in Durham, cannot bring an action on the custom of merchants against the drawer, and lay the same in London, for a bill of exchange is not equal to bond or specialty, which are the deceased's goods, where they happen to be at his death, but is a simple contract debt which follows the person of the debtor, and makes *bona notabilia* where he resides.

Carth. 373, Yeomans and Bradshaw; Comb. 392, S. C. adjudged, and the plaintiff's writ should abate. *Qu.*

|| In debt by an administrator on an administration committed by the Bishop of London, the defendant pleaded in bar that the intestate at the time of his death was resident in another diocese; and it was holden good on demurrer. And by the court; the simple contract debts are personal, and administration must be committed of them where the party dies. And if a man have two houses in several dioceses, and live most at one, but sometimes go to the other, and being there for a day or two, die; administration of his personal estate shall be granted by the bishop of this diocese, for he was commorant there, and not there as a traveller.

Hilliard v. Cox, 1 Salk. 37.||

With regard to the following persons, the law is altered by the 4 Ann. c. 16, § 26, by which, reciting, "That great trouble is frequently occasioned to the widows and orphans of persons dying intestate to moneys, or wages due for work done in her majesty's yards and docks, by disputes hap-

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pening about the authority of granting probate of the wills and letters of administration of the goods and chattels of such persons; it is enacted, for the preventing of such unnecessary trouble and expense, That the power of granting probates of the wills and letters of administration of the goods and chattels of such person and persons respectively is, and is hereby declared to be, in the ordinary of the diocese, or such other persons to whom the ordinary power of probate of wills, or granting letters of administration, doth belong, where such person or persons shall respectively die; and that the salary, wages, or pay due to such person or persons from the queen's majesty, her heirs or successors, for work done in any of the yards or docks, shall not be taken or deemed to be *bona notabilia*, whereby to found the jurisdiction of the prerogative court."

|| To obtain an order of the Court of Chancery for the payment of a sum of money out of court, however small the amount, a prerogative probate is holden to be indispensable.

Newman v. Hodgson, 7 Ves. 409; Thomas v. Davies, 12 Ves. 417.||

## 4. Of the Probate of Wills and granting of Administration by the Bishop of the Diocese.

The ordinary hath regularly the probate of wills and granting of administration of every person dying within his diocese: this jurisdiction he may either exercise himself, or it may be done by his official, for it is but a ministerial act, and no ways concerns the bishop, as bishop in his spiritual capacity, and, therefore, he may do the thing by another; for originally the probate of wills did not belong to the ecclesiastical judges.

Godolph. 58. See Gilb. Eq. Rep. 203; Cowp. 141.

This power of granting administration is annexed to the person of the bishop, and, therefore, if a bishop of Ireland happens to be in England, he may grant administration here of any thing within his diocese in Ireland.

Godb. 33; Carter and Cross, Cro. Car. 214; 6 Mod. 145, S. P. per Holt, C. J.

If a bishopric be vacant, the dean and chapter are to grant administration.

Ro. Abr. 908; 1 Lutw. 30.

## 5. Of the Probate of Wills, and granting of Administration, where the Party dies within some peculiar Jurisdiction.

If a person dies within some peculiar jurisdiction, the probate of his will, as also the granting of administration, belongs to the judge of such peculiar, which is founded upon a supposition of an original composition between him and the ordinary of the diocese for that purpose.

4 Inst. 338; Salk. 40, pl. 10.

These peculiars are either regal, archiepiscopal, episcopal, or archidiaconal, in each of which the owner of (a) common right hath power to grant administration.

Salk. 41; 6 Mod. 241. (a) Where administration was granted by a rural dean, the goods of the deceased not amounting to more than 40*l.*, 5 Mod. 424.

## 6. Of the Jurisdiction of some Lords of Manors in the Probate of Wills.

Although it be regularly true, that at present the spiritual court is the only court that hath jurisdiction in the probate of wills and granting of administration; yet from this general rule must be excepted all (b) courts

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baron that have had probate of wills time out of mind, and have always continued that usage.

(b) Such as that in the manor of Mansfield, and those in Cowle and Caversham in Oxfordshire, which the author of Off. of Exec. 43, says, he himself kept.

This jurisdiction can only be claimed by prescription, and therefore a person who has administration granted to him by a lord of a manor declares, that *per A B dominum manerii cui administrationis commissio de jure pertinet per consuetudinem infra maner. præd. a tempore cujus contrarii memoria hominum non existit usitat. et approbat. debito modo commissa fuit.*

Thomp. Entr. 342; Salk. 41; 6 Mod. 242.

#### 7. Of the Jurisdiction of some Mayors in respect of the Burgesses within such a Place.

By custom the probate of wills belongs to the mayors of some boroughs in respect of the burgesses, as to lands devisable in such boroughs; but as to goods the same will may also be proved before the ordinary.

Off. of Exec. 45; Godolph. 58. For the custom of London in relation to orphans, &c. vide tit. *Custom of London*.

#### 8. The Form of proving a Will and taking out Administration, and therein of entering a Caveat.

The judge may, *ex officio*, or at the instance of the party interested, call the executor to prove the will: some say, he may be cited at the instance of any person, to know whether the party instancing hath any legacy left him or not.

Godolph. 60.

If the executor appears not to prove the will upon the ordinary's process, but stands in contempt, he is excommunicable; but if he appears and makes oath, that the testator had *bona notabilia* in divers dioceses, or within some peculiar jurisdiction than that wherein he died, he is to be dismissed to prove the will in the archbishop's court, and to exhibit the same under seal within forty days next after.

Godolph. 58, 59.

Also, the ordinary or metropolitan, as the case shall require, may sequester the testator's goods until the executor proves the will.

Godolph. 63.

If it be uncertain whether the testator be dead or alive, it must be left to the discretion of the judge, whether he thinks him so or not; and if there be good presumptive evidence in law to think him dead, then he must prove the will; as if he be beyond sea in remote parts, and it is common and constant fame that he is dead; especially, if the executor of such person be honest, and the goods are *bona peritura*, and the testament itself in favour of children, or *ad pios usus*.

Godolph. 61, 62.

The time of proving a will is left to the discretion of the judge, according as the circumstances of the case shall require or admit; but regularly it ought to be insinuated within four months after the testator's death.(a)

Godolph. 61. (a) ¶ But now by st. 55 G. 3, c. 108, § 37, it is enacted, that "if any person shall take possession of, and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there

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shall be any such, which shall not be ended within four calendar months after the death of the deceased, every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds *per centum* on the amount of the stamp duty payable on the probate of the will or letters of administration of the estate and effects of the deceased.”

Testaments may be proved either in common form, as where there is no contest about the will; but the executor presenting the will before the judge, without citing the parties interested, doth depose the same to be the true, whole, and last will of the testator, and thereupon the judge does allow the will, and fix his seal and probate to it.

Godolph. 62.

Or, a will may be proved in form of law, as when it is exhibited before the judge in presence of the parties interested, as the widow and next of kin, and then the proof examined and fully heard, and at last allowed.

Godolph. 62.

The difference between the two probates is this; where a will is proved in common form, it was, at any time afterwards within thirty years, to be questioned and called in debate, which it cannot be in case it be proved in form of law.

Godolph. 62.

If the executor refuse to prove the will, or if there be a will and no executor named, the ordinary is to commit administration *cum testamento annexo* to some proper person, from whom he may take bond for a faithful administration: but in case there be no will, then he is to grant administration to the next of kin of the deceased; and in case of their refusal, he may grant it to a creditor, or any other person desiring the same; and if nobody will take administration, the ordinary may grant letters *ad colligend. bona defunct.*

Godolph. 61.

If there be a testamentary disposition without an executor, the party, in whose favour the disposition was made, must cite the next of kin before he can have administration.

It is usual, when there is a contest about a will, or when the right of administration comes in question, to enter a *caveat* in the spiritual court, which by their law is said to stand in force for (a) three months.

Godolph. 258; Goldsb. 119. (a) As said by Dr. Talbot in his argument of the case of Hutchins and Glover. 2 Ro. Rep. 6; Cro. Ja. 463, 464.

But it is said that our law takes no notice of a *caveat*, and that it is but a mere cautionary act done by a stranger, to prevent the ordinary from doing any wrong, and that, therefore, if administration be granted pending a *caveat*, this is valid in our law, though by the law in the spiritual court it may be such an irregularity as will be sufficient to repeal it.

Ro. Rep. 191; Cro. Ja. 463; 2 Ro. Rep. 6.

In the case of one Offley, administration was granted to him pending a *caveat*, and no notice taken of it, or of the party that entered it, and for this cause there was a citation to have this administration repealed; and on a motion for a prohibition in behalf of Offley, it was urged, that the spiritual court having once granted administration, they had executed their authority, and had no power over the administrator afterwards, and a *caveat* is only for private information of the judge, but does not suspend their jurisdiction; it is *concilium*, but not *præceptum*; no countenance was ever given to it by the law: that to give them liberty to repeal administration

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for this cause, were to give it them in all cases, and then all the inconveniences of compelling distribution will follow, for they may leave out some formality on purpose to preserve a power over the administrator, or they may make it cause of repeal, because administration is granted to a child already preferred, or the like; and by the 21 H. 8, c. 5, they have an election, which when it is once made, no man can complain; for none have any right or title precedent: and for these reasons a prohibition was granted: but on another day, on motion for a consultation, the court said, that to take from the spiritual court all power of examining the formality of granting letters of administration, would occasion undue catching of administrations, and confound and destroy all their forms and course of proceedings which are in some cases necessary; and it was not the intention of the statute to alter the course of granting administrations, and to establish irregular administrations, but only to direct the ordinary, and to strengthen the liberty they took upon them before; and for the matter of the *caveat*, we know not what weight and regard it may have in their law; it may be essentially necessary, that where there is a contest and competition, both parties should be heard before any thing be done or the *caveat* dismissed: they have a rule, that no administration should be granted within fourteen days, that no party may be surprised, and we have known an administration granted against this rule repealed, though nobody else could pretend any right; but the same day a new administration has been granted to the same party: and in these kind of questions creditors are concerned; and it may be very mischievous to throw off and slight all their forms; wherefore the court would advise. And according to the report of this case, in 1 Lev., Moreton and Windham, at another day, were for discharging the rule for a prohibition; and they held, that granting administration, pending a *caveat*, was sufficient cause to revoke, and that it was like a *supersedeas* in our law, which made a judgment given afterwards erroneous. But Kelynge and Twisden held, that the *caveat* was of no force to hinder the grant of the administration; for it was not a judicial act of the court, but only an entry of a *memorandum* by a clerk in court, for the giving of caution; and being no judgment or record of the court, the court of B. R. are as proper judges of the force and effect of it as the spiritual courts, and are likewise to see that they grant administration according as they are empowered by the statutes. And the court being thus divided, there could be no rule for discharging the prohibition.

Lev. 186; Offley and Best, Sid. 293, and 2 Keb. 63, 72, S. C.

### 9. Of the Executor's Refusal.

The executor being a private officer of trust named by the testator, and not the law, he may refuse, but cannot assign the office.

If the executor refuses to appear upon the ordinary's summons, he is punishable for a contempt; but yet he cannot be compelled to accept the executorship, whether he will or not.

Off. of Exec. 36, 37; Godolph. 140; Vaugh. 144.

And, therefore, if an executor refuses before the ordinary to take upon him the executorship, the ordinary may grant administration *cum testamento annexo* to another person; and he can never afterwards be permitted to prove the will.

Ro. Abr. 907; Plow. 281.



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But, if the executor appears and takes the usual oath before the surrogate, and afterwards refuses before the ordinary, yet administration cannot be granted to another; for having once taken the oath, he has made his election, and cannot afterwards refuse the executorship; and if the ordinary will not admit him, a *mandamus* will lie, though on oath taken before a surrogate, the ecclesiastical court have no further authority.

Vent. 535.

In case the ordinary himself is made executor, he may refuse before the commissary.

Off. of Exec. 37.

But an executor cannot refuse by any act *in pais*, as by declaring that he would not accept the executorship, but it must be done by some (a) act entered and recorded in the spiritual court, and before the ordinary.

Off. of Exec. 37. (a) But where Bacon, Lord Keeper, Catlin, Ch. Just., and the master of the rolls, were made executors, and they wrote a letter to the ordinary, signifying that they could not attend the executorship, and desiring him to commit administration to the next of kin of the deceased; which being recorded, it was holden a sufficient refusal; Cro. Eliz. 92; Off. of Exec. 37; Owen, 41; Moore, 272; Leon. 135, S. C.; and that no executor named could act after. β There is no particular form necessary for a renunciation by an executor; any writing showing such intention, filed in the proper office, will be sufficient. *Commonwealth v. Mateer*, 16 S. & R. 416. γ But an executor may pray time to consider if he will act, and the ordinary may give and grant letters *ad colligendum* in the *interim*, but not administration.

When an executor hath once administered, (a) he cannot afterwards refuse to prove the will, because by the administration he accepts the executorship upon him, and so hath made his choice; therefore, in that case, the ordinary ought to compel him to accept the executorship and prove the will.

Godolph. 141; 2 Jon. 72; 2 Mod. 146; Vent. 303; 2 Lev. 182. (a) || And now by 55 G. 3, c. 108, § 37, (*supra* p. 50.) if he administer, and omit to take probate within six months after the death of the deceased, he is liable to a penalty of 100*l.*, and also to pay 10*l.* *per cent.* on the amount of the stamp duty. ||

Yet it is said, that if the judge, knowing that one hath administered, will, notwithstanding, accept his refusal, and commits administration, that is good, for the spiritual judge is the proper judge of the matter; but after refusal and administration granted to another, the executor may not recede from it, and go back to prove the will and assume the executorship.

Ro. Abr. 907; Off. of Exec. 40, 41. [Sed Vide 1 Mod. 213, that the administration in such case is void.]

But if administration be committed only because the executor did not upon process or summons appear to prove the will, the executor may at any time after come in and prove the will.

Off. of Exec. 40, 41.

If after the executor hath refused, and the ordinary hath committed administration, it appears to the ordinary that the executor had administered before, and so determined his election, he may revoke the letters of administration, and enforce the executor to prove the will.

Off. of Exec. 40, 41.

If an executor hath once administered, though he afterwards refuse before the ordinary, yet it seems he still continues liable to the creditors, for the plea is *ne unq. executor, ne unq. administ. come executor*.

Leon. 154, 155; Off. of Exec. 40, 41.

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If there are several executors, and they all refuse before the ordinary, he may grant administration with the will annexed.

Ro. Abr. 907.

But if there are several executors, and some of them renounce before the ordinary, and the rest prove the will, by (a) our law they who renounced may, at any time afterwards, come in and administer, having the right in them; and though they never acted during the life of their companions, yet may they come in and take upon them the execution of the will after their death, and shall be preferred before any executor made by their companions, because, as the will is proved, the ordinary has no authority to take the refusal; and probate by one executor entitles all the executors to sue.

5 Co. 28; 9 Co. 36; Moore, 373; Dyer, 160; Hard. 111; 7 Mod. 39. ¶ When there are several executors, and one renounces, and the others prove the will, he who renounces may at any time afterwards come in and administer. Ex parte Taggart, 1 Ashm. 321. In Vermont, none can act except those who give bond under the statute. Frask v. Donoghue, 1 Aik. 370. (a) Salk. 311, pl. 15, S. P., where it is said that the civilians held, that by their law a renunciation was peremptory. [So, Robinson v. Pett, 3 P. Wms. 251; Arnold v. Blencowe, at the Rolls, Jan. 31, 1788. Et vide R. v. Simpson, 3 Burr. 1463, and 1 Bl. Rep. 456.]

#### 10. What Acts amount to an Administration, so that the Party cannot afterwards refuse.

It hath been already observed, that if an executor once administers he cannot afterwards refuse to prove the will, because by the administration he has made his choice and subjected himself to the actions of the testator's creditors.

Off. of Exec. 38; Mod. 213. ¶ One appointed as executor, who intermeddled with the estate of the testator and afterwards renounced, was held liable to be sued in equity in the character of executor, by the legatees under the will, one of whom was also executrix and had proved the will. Rogers v. Frank, 1 Yo. & Jer. 409. [If there are two executors, and one administers, he alone will be charged with the receipts in equity, though he afterwards renounce, and pay over the money to the other executor, who proved the will. Read v. Truelove, Ambl. 417.]

Therefore it is necessary to consider what acts will amount to an administration, and here we may lay down two general rules: 1st. That whatever the executor does with relation to the goods and effects of the testator, which shows an intention in him to take upon him the executorship, will regularly amount to an administration. 2dly. That whatever acts will make a man liable as an executor *de son tort*, will be deemed an election of the executorship.

Ro. Abr. 917.

Hence it hath been adjudged, that if the executor takes possession of the testator's goods and converts them to his own use, or disposes of them to others, that this is an administration.

Ro. Abr. 917; Dyer, 166; Off. of Exec. 39.

So if he takes the goods of a stranger, under an apprehension that they belonged to the testator, and administers them, this amounts to an administration.

Ro. Abr. 917.

As, where the testator being tenant at will of certain goods, his executor seized the goods, supposing them to belong to the testator, with an intent to administer; it was holden, that his intention appearing, this made him executor in law.

Ro. Abr. 917.

But if an executor seizes the testator's goods, claiming a property in them

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himself; though afterwards it appears that he had no right, yet this will not make him executor; for the claim of property shows a different view and intention in him, than that of administering as executor.

If an executor receives debts due to the testator, and, especially, if he gives acquittances for such debts, this amounts to an election of the executorship.

Moore, 14; And. 11; Ro. Abr. 917.

So, if he releases a debt due to the testator.

Ro. Abr. 918.

So, if there are two executors, and one of them hath a specific legacy devised to him, and he takes possession of it, without the consent of his co-executor, this amounts to an administration; for a devisee cannot take a personal chattel devised to him without the assent of the executor.

Ro. Abr. 917.

### 11. *Of bringing in an Inventory, and accounting.*

An inventory is a full and just description of all the personal estate and effects which belonged to the deceased, and which by the civil law, and also by the statutes of this realm, executors and administrators are obliged to make, and present the same to the proper ecclesiastical judge.

Godolph. 150; Swinb. 401.

The practice of exhibiting an inventory was introduced from a rule in the civil law, subjecting the heir to the payment of his ancestor's debts; which proving very prejudicial to him, as such debts often amounted to more than the value of the inheritance which descended to him, it was ordained, that if the heir would exhibit a true inventory of all the goods and chattels of the deceased, he should be no farther chargeable than to the value of the inventory; and so much strictness was required by that law, in making an inventory, that if the heir neglected it for a year or more, he was obliged to pay all the debts and legacies, though he had not sufficient of the testator's estate to do it.

Godolph. 150.  $\beta$  This advantage is known by the name of benefit of inventory. The mode of obtaining is prescribed by the Civil Code of Louisiana, art. 1025, et seq. See Poth. des Successions, c. 3, s. 3, a. 2; Bouv. L. D. *Benefit of Inventory*. $\gamma$

The reason of an inventory with us at this day, is for the benefit of creditors and legatees; and, therefore, every executor is compellable to bring in an inventory, at the discretion of the ordinary; and if he presumes to administer without bringing in such inventory, he is punishable in the spiritual court.

Swinb. 401; Godolph. 151.  $\beta$  Commonwealth v. Bryan, 8 S. & R. 128; Bradford's Administrators, 1 P. A. Bro. 87. $\gamma$

But as this matter of bringing in an inventory and accounting is enjoined and directed by several acts of parliament, we shall here take notice, and in the first place insert those clauses of the statutes which are relative to this matter. By the 31 E. 3, c. 9, "Administrators shall be accountable to the ordinaries as executors be in the case of testaments."

By the 21 H. 8, c. 5,  $\S$  4, it is enacted, "That the executor and executors named by the testator or person deceased, or such other person or persons to whom administration shall be committed, where any person dieth intestate, or by way of intestate, calling or taking to him or them such person or persons, two at the least, to whom the said person so dying was indebted, or made any legacy; and upon their refusal or absence, two other

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honest persons, being next of kin to the person so dying, and in their default or absence, two other honest persons; and in their presence, and by their discretions, shall make or cause to be made a true and perfect inventory of all the goods, chattels, wares, merchandises, as well movable as not movable, whatsoever, that were of the person so deceased, and the same shall cause to be indented; whereof the one part shall be by the said executor or executors, administrator or administrators, upon his or their oath or oaths, to be taken before the bishops, ordinaries, their officials or commissaries, or other persons, having power to take probate of testaments, upon the *holy evangelists*, to be good and true, and the same one part indented shall present and deliver into the keeping of the said bishop, ordinary or ordinaries, or other person having power to take probate of testaments; and the other part thereof to remain with the said executor or executors, administrator or administrators; and that no bishop, ordinary, or other whatsoever person having authority to take probate of testament or testaments, upon the pain in this estatute (a) hereafter contained, refuse to take any such inventory or inventories to him or them presented or tendered, to be delivered as aforesaid."

(a) 10l.

By the 22 & 23 Car. 2, c. 10, it is enacted, "That all ordinaries, as well the judges of the Prerogative Courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administration of the goods of persons dying intestate, of the respective person or persons to whom any administration is to be committed, take sufficient bonds, with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis*: The condition of this obligation is such, (b) that if the within bounden A B, administrator of all and singular the goods, chattels, and credits of C D, deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which have or shall come to the hands, possession, or knowledge of him the said A B, or into the hands and possession of any other person or persons for him, and the same so made do exhibit, or cause to be exhibited, into the registry of                      court, at or before the                      day of                      next ensuing, and the same goods, chattels, and credits, and all other the goods, chattels, and credits of the said deceased, at the time of his death, which at any time after shall come to the hands or possession of the said A B, or into the hands and possession of any other person or persons for him, do well and truly administer according to law; and further, do make, or cause to be made, a true and just account of his said administration, at or before the                      day of                      : And all the rest and residue of the said goods, chattels, and credits, which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges, by his or their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint. And if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A B within bounden

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being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court, then this obligation to be void and of none effect, or else to remain in full force and virtue. Which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any courts of justice; and also that the said ordinaries and judges respectively shall and may, and are enabled to proceed to call such administrators to account, for and touching the goods of any person dying intestate; and upon hearing and due consideration thereof, to order and make just and equal distribution, &c.”

(b) [The next of kin, or a creditor, have a right *ex debito justitiæ* to put this bond in suit in the name of the ordinary, Archbishop of Canterbury v. House, Cowp. 140, and, therefore, the ordinary, or his personal representative, may be compelled by *mandamus* to deliver up the bond for this purpose. Rex v. Johnson, Executrix of the Bishop of Worcester, and others, East, 29 Geo. 3.] {1 Wash. 31, Braxton v. Winslow. But a surety in the bond cannot, though he is a creditor, bring an action on it against his co-surety for a default in the principal, before he has received any injury as surety. 1 John. Rep. 311, The People v. Duncan. If the right of suing on the administration bond is abused, the court will set aside the proceedings. Cowp. 141; 1 John. Rep. 311. See 3 Mass. T. Rep. 252; 1 Wash. 33; 1 Hen. & Mun. 10, 53.}

But by the 1 Ja. 2, c. 17, § 6, it is provided, “That no administrator shall be cited to any of the courts in the said last act mentioned, to render an account of the personal estate of his intestate, (otherwise than by an inventory or inventories thereof,) unless it be at the instance or prosecution of some person or persons in behalf of a minor, or having a demand out of such personal estate, as a creditor or next of kin, nor be compellable to account before any of the ordinaries or judges by the said last act empowered and appointed to take the same, otherwise than as is aforesaid.”

*Per* Holt, C. J. Even before this statute, the ordinary could not *ex officio* cite an administrator to account; so that really this statute has no effect at all, for the law was so before. Salk. 316.

The inventory is to contain, in separate and distinct articles, all the (a) goods, chattels, and credits, or (b) debts due to the deceased, and the prices at which they were valued.

Godolph. 152. (a) And by Swinb. 407, the order heretofore used, was first to inventory and appraise the movable goods, such as household stuff, corn, cattle, &c.; then the immovable, as chattels real, or leases of lands, and after, the debts due to the testator; which order, he says, is observed to this day. (b) That, on a plea of *plene administravit*, all sperate debts mentioned in the inventory shall be accounted assets in the executors' hands; for it is as much as to say, that they may be had for demanding, unless the demand and refusal be proved. Salk. 296, pl. 3, ruled upon evidence by Holt, C. J. [And if the inventory does not distinguish between the *sperate* and *desperate* debts, it will charge the executor with the whole as assets, and put him to prove if any of them were desperate. Bull. N. P. 140, 2. 2 Anon. 1 Hayw. 481.] Upon the issue of *plene administravit*, the plaintiff cannot give in evidence a copy of the inventory delivered by the defendant to the spiritual court, *unless it be signed by him*, though it be signed by the appraisers: but, if he can give an inventory in evidence, he may show that the goods were undervalued. *Id.* *ibid.*]

But such things as are fixed to the freehold, and belong to the heir, as glass windows, wainscot, fish in a pond, and doves in a pigeon-house, are not to be put into the inventory.

Godolph. 152.

So, the wife's *paraphernalia*, or such apparel as is suitable to her degree and quality, need not be put in the inventory, for they survive to her, and are not esteemed part of the husband's personal estate.

Godolph. 153, 403.

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β It is the duty of the administrator to inventory property fraudulently conveyed by the intestate.

Andrus' Adm'r. v. Doolittle, 11 Conn. 283.

By the ecclesiastical law, the time of making and exhibiting an inventory is left to the discretion of the ordinary, who may require it to be done (a) sooner or later, according to the distance the goods lie from the executor, and other circumstances.

Swinb. 405. (a) And according to Godolph. 150, the making an inventory is to be begun within thirty days after opening the testament, and notice thereof to the executor, and is to be finished within sixty days after, unless the executor and the testator's goods, or the greatest part thereof, be far remote and distant from each other, in which case the law doth allow one year from the time of the testator's death for the making thereof; and during this time no suit is to be commenced against the executor in the ecclesiastical court; and in Godolph. 225, it is said, that an executor is to have a competent time to account, which time is a twelvemonth.

And as an explanation of the manner of bringing in an inventory and accounting, and the necessity thereof, and how these are construed and required by the common law courts, I shall here insert the following case.

In debt upon an administration bond and *oyer* prayed of the condition, defendant pleads, 1st, That he did exhibit an inventory by the time. 2dly, That he had administered all according to law. 3dly, That he was not cited to bring in his accounts, so that no decree was made concerning them. Plaintiff replies, that the intestate was bound in a bond of so much, &c., to J S, for payment of such a sum, and that J S had brought an action of debt upon that bond against the defendant, and had got judgment; and though divers goods to the value of that debt came to the defendant's hands, yet he had not paid it, but had converted them. Defendant makes a frivolous rejoinder; and upon that the plaintiff demurs; and the question made upon the case is, if the defendant the administrator is bound to bring in his accounts before the ordinary in the ecclesiastical court, by the time specified in the condition of the bond, not being cited or summoned thereto. And Holt, Ch. Just., in pronouncing the opinion of the court, said, that they were all unanimous, that he was obliged to account, though not cited or summoned. And he said first, that an executor or administrator is obliged to account is very plain by the 31 E. 3, st. 1, c. 11, at the end of the statute, where they are made accountable to the ordinary, as executors be in case of testament; and though the ordinary had no power to oblige them to account upon oath, yet, if they were sued in Chancery by any creditor for the discovery of assets, there they were obliged to account upon oath, and the ordinary could not relieve them, Noy, 78; 2 Inst. 600; but that the account given in before the ordinary should be looked into, and unravelled. 2dly, If a legatee comes to sue for his legacy, he may unravel the account given in before the ordinary, because he cited them into the spiritual court, and has no remedy elsewhere for his legacy; but, if the executor or administrator will pay the legacy, then he cannot unravel their accounts, because, when the legacy is paid, this is the end of their suit; as in Raym. 470, Boon's case. As to the principal point, this statute 22 & 23 Car. 2, c. 10, was made to make the wife and next of kin as legatees, after all debts paid, and they are to sue for their legacies or shares in the ecclesiastical court; for the law was defective before, in that the ordinary had no power to compel a distribution, because the administrator had the same power as the executor; and after administration committed, the ordinary's

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power was at an end, and he had nothing more to do with the goods of the intestate; but now this statute was made to ascertain and settle a distribution; and the wife and next of kin may compel the administrator to make such division and distribution, and he is bound at his peril to account by the time limited; and if not done, he must show some reasons wherefore it was not done; as that no court was then holden, &c., or some other matter which rendered it impossible to account by that time. And it appears by Co. Ent. 128, that the condition of administration bonds before this statute was, that he should account when thereunto required; not *ex officio*; but now the act of parliament enjoins him to account peremptorily before such a time, and therefore he is bound at his peril to do it: and in all cases where a man is bound in a bond to do a thing, he is bound at his peril to do it; as, if a man is bound in a bond, with condition to pay money at such a time and place, although the obligee does not come there at the time, so as that he cannot pay it; yet if the obligor is not there ready to pay it, and does not stay there till the last instant or sunset, he forfeits his bond, and he must plead that he was there and stayed till sunset, and had the money ready, and that nobody came there to receive it; and if a request be to be made, he must be there ready to be requested. And he took a difference between rent payable by reservation only, and when a bond is given for it; for in case of the bond he forfeits it, if he be not there ready to pay it, though no demand be made. Hob. 8, Baker and Spain. Suppose one is bound in a bond conditional to do a thing, which without the concurrence of the obligee cannot be done, as to levy a fine in C. B. in Oct. Hil., if no writ of covenant be sued out, yet he is bound to be there at the time ready to levy it, and must plead so, and that no writ of covenant was sued out; so here, if he could not account, because no court was holden, he ought to have pleaded it, for he ought to have done all in his power; but it is most certain the ecclesiastical courts are always open, and the statute makes no alteration as to the accounts. But then he made another point of the case, and ordered counsel to speak to it the next term. The point was this: the bar, which says he was never cited to account, is ill, because he ought to have accounted at his peril, without any citation; but then this leaves room for an implication, that he may have accounted, though not cited; for he only says, he was not cited to account, and then the replication, which assigns for breach, non-payment of such a debt, is ill, and does not maintain the declaration as to the not accounting; and the meaning of the statute was not, that he should pay all debts *ex officio*, but as the creditors called him to pay them; and then whether the plaintiff shall have judgment upon the insufficient bar of the defendant, or whether by his replication it appears he has no cause of action, and so cannot have judgment, is a point fit to be argued, and cited 1 Lutw. 182; 8 Co. 120, Dr. Bonham's case; and 130, Turner's case.

Hil. 6 Ann., Archbishop of Canterbury v. Willis, Salk. 251, pl. 3, S. C. || This case was cited by Lee, C. J., in Folkes v. Dominicque, B. R. 13 & 14 G. 2, and allowed to be law. And it was there holden, that although the administration bonds taken by 22 & 23 Car. 2, are conditioned for the payment of debts as well as legacies; yet the breach therein is not assignable for the non-payment of debts, but only for the non-payment of legacies; for the spiritual court has no power over the debts. MS. || § An administrator who knows of notes of hand belonging to the intestate's estate, deposited in the hands of a stranger, and does not cause them to be inventoried, though he is himself the promisor and does not admit them to be due, is guilty of a breach of the administration bond. Potter v. Titcomb, 1 Fairf. 53.

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[If the executor enter to the testator's goods, and will make no inventory thereof, then may every legatory recover his whole legacy at his hands; for, in this case, the law presumeth that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same; whereas, otherwise, the executor is presumed not to have any more goods which were the testator's, than are described in the inventory,<sup>(a)</sup> the same being lawfully made.

Swin. 228. (a) Nor shall the inventory be conclusive on him, if there should be afterwards an unexpected deficiency of the assets. 2 Ves. 191.

If the executor make no inventory, but pay interest on a legacy, or pay all the legacies but one, this shall be received as evidence of assets as to that legacy, though not positively conclusive.

Corporation of Clergymen's Sons v. Swainson, 1 Ves. 75; Orr v. Kaines, 2 Ves. 191; Belt's Supplem. 324.] β The neglect to return an inventory is not sufficient to charge the executor with the debts of the intestate. Lake's Admrs. v. Beanes, 2 Har. & Johns. 373. γ

|| After an inventory is exhibited, a creditor cannot impeach it in the ecclesiastical court; for the stat. 21 H. 8, which requires an executor or administrator to make an inventory, enjoins him only to deliver it on oath into the keeping of the ordinary, who is bound to receive it on its being so presented.

4 Burn's E. L. 267; Hinton v. Parker, 8 Mod. 168; Catchside v. Ovington, 3 Burr. 1922.

A creditor may indeed state objections to the inventory in that court, which the party is bound to answer upon oath; but no evidence is admissible to contradict the answer. If the creditor is still dissatisfied, he may resort to equity for more effectual relief.

2 Fonbl. 418, *Note*.

By the custom of London, if any man or woman free of the city die, leaving an orphan within age, and not married, the mayor and aldermen may compel the executor or administrator to appear at a court of orphanage, and exhibit an inventory; and in case any debt appear to be outstanding, to give security to the chamberlain to render upon oath a true account of the same when received; and on his refusal, may commit him till compliance. Nor shall his having already given security to the spiritual court, release him from the obligation of the custom.

Toll. Exec. 254; Com. Dig. *Guardian*, (G. 1;) Luch's case, Hob. 247; 1 Ro. Abr. 550, S. C. ||

### 12. Where Administration unduly obtained may be revoked or repealed.

It seems to have been formerly holden in some cases, that if the ordinary once granted administration, he could not afterwards revoke or repeal it; for having once executed his power, he had nothing further to do in the affair.

Fotherbie's case, Cro. Car. 62; Ro. Abr. 303; Style, 10; 6 Co. 18; Cro. Eliz. 459; Moore, 396.

Hence, in Sir George Sands's case, where a prohibition was prayed, because Sir George had the administration of his son's goods granted to him; and since that a woman, pretending she was his wife, sued to have the administration repealed; a prohibition was granted; for though the statute says, the ordinary may grant administration to the wife or next of



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kin; yet when he has granted it to the next of kin, as the father is, he has executed his power, and his hands are closed, and he cannot repeal it.

Sir George Sands's case, Sid. 179; Keb. 683, and Raym. 93, S. C., in which last book a further reason seems to be given, viz. that our law is to determine who is the next of kin within this statute; and that by our law the father is next of kin to his child, vide 3 Co. in Ratcliffe's case, and Bro. tit. *Administration*, 47. But 3 Salk. 22, *feme covert* died intestate; administration granted to her next of kin; husband sues for a repeal; prohibition denied, for ordinary could not grant administration to any but the husband.

But, notwithstanding these opinions, it is now agreed, that the ordinary may revoke or set aside an administration granted to the next of kin, and that for several causes; as, if they forge or suppress a will; if they come too hastily to take out administration within the fourteen days; if they go beyond sea; become *non compos*; or if they take out administration without security to account and exhibit inventories; or, if there be a residuary legatee; and may in general, for any fraud used in obtaining it; for it would be absurd to allow a court jurisdiction herein, and at the same time deprive them of the liberty of vacating and setting aside an act of their own, which was obtained from them by deceit and imposition.

Latch. 67; Dyer, 372; Sid. 280; Lev. 157; Keb. 846, 854; 2 Keb. 63, 72; Sid. 293, 370; Lev. 186; 2 Lev. 55, 2 Str. 911. *℞* Roborg's Admr. v. Hammond's Admr., 2 Har. & Gill, 42; The State v. Blackistone, 2 Har. & Gill, 139.*g*

### 13. How far a Repeal makes all mesne Acts void.

If the testator makes a will and appoints an executor, and the ordinary, without taking notice of any such will, grants administration to J S, and afterwards the executor comes in and proves the will, such executor shall regularly avoid all mesne acts done by the administrator; for the executor, by being made such, had an (*a*) interest, which the ordinary could not deprive him of.

Greysbrook and Fox, Plow. 277; 2 Lev. 182; 2 Jon. 72; Vent. 303. (*a*) And therefore if an executor sells a term, and afterwards refuses before the ordinary, and administration is granted to J S, who likewise sells this term to another, the first vendee shall have it. 2 Lev. 183, said *arguendo*.

But, if the ordinary grants administration, and after there appears to be an executor, if the administrator pays debts, legacies, or funeral expenses, which the executor ought to have paid, in trespass against him by the executor, he shall (*b*) recoup so much in damages.

Peckham's case, Plow. 279; 4 Eliz. cited in Greysbrook and Fox. *℞* When an administrator is legally appointed, and a will of the decedent is subsequently discovered, in which an executor is appointed, this only operates as a repeal of the grant of letters of administration. His intermediate acts are good. Executor of Bigelow v. Administrators of Bigelow, 4 Ohio, 147.*g* (*b*) So, it was holden in equity, where a widow possessed herself of the personal estate as executrix under a revoked will, and paid debts and legacies, but had no notice of the revocation, that she should be allowed those payments. Chan. Ca. 126; but ordered the leases she had made to be set aside. *℞* When probate of a will has been made, and administration granted to the executor, which is afterwards revoked, his intermediate acts are valid. Peeble's Appeal, 15 S. & R. 39.*g*

If the testator makes a will, and thereof appoints A executor, and afterwards makes a second will, and thereof appoints B executor, and A has the probate of the first will granted to him, by virtue of which a debtor to the testator pays him a debt without notice of any second will, and has a release from him; yet, upon B's proving the second will, and repeal of the probate of the first, he may compel the debtor to pay the money over again;

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for though this be a particular hardship, yet the inconveniency would be much greater, to allow the ordinary to make any other executor than whom the testator had made.

Ro. Abr. 919; 16 Car. 1, in B. R., between Greeves and Weigham, said to be adjudged by the advice of all the judges in Sergeants' Inn, in an action brought by B against such creditor. [Comyns, 150. But see 3 T. R. 125, *contra*—where the authority of the cases, both in Rolle and Comyns, is denied. See also S. P., Stephens v. Langley, Finch's Rep. 40; Vin. Abr. tit. *Executors*, (M. 10,) pl. 6.]

But in a case where the plaintiffs, as executors, had a judgment against the defendant, and then there was a suit in the spiritual court before the same judge, who granted letters of administration to the plaintiff to repeal them; and the defendant therefore prayed that execution might not go out against him till the matters in the spiritual court should be determined; the court denied it, for this reason, that if a debtor pay money on a judgment and execution to one who is executor *de facto*, having a probate under the seal of a prerogative court, he shall never be forced to pay it again; and here the suit to repeal the administration being before the same judge who granted it, can have no influence only from the time of the judgment of repeal; but, (a) if it had been before the delegates by way of appeal, it might be otherwise.

Hill. 25 & 26 Car. 2, between Digby and Hollis v. Wray in B. R. (a) That an appeal suspends the former sentence; but a citation is in nature of a new suit, and has no effect till there be judgment on it. 6 Co. 18 b; Lev. 158; Raym. 224; 2 Lev. 90, S. P.

It is clear, that if the ordinary grants administration to (b) a stranger, and he is cited by the next of kin to have it repealed, pending which suit the administrator (c) sells the goods, and then the administration is repealed; that in this case the sale is good, for the administrator acted under a lawful authority, which vested the absolute property of the goods in him; and though the sale had been fraudulent, yet it could not be avoided by the second administrator; but as to creditors it may, by the 13 Eliz. c. 5.

6 Co. 18 b, Packman's case; Cro. Eliz. 459; Moore, 396, S. C. (b) So, if administration be committed to a creditor, and after repealed at the suit of the next of kin, he shall retain against the rightful administrator; and his disposal of the goods, even pending the citation, till sentence of repeal, stands good. Salk. 38, pl. 6; Id. Raym. 684; Com. Rep. 96, pl. 65, *per* Holt, C. J. (c) But, where an administrator released to a creditor, and after the administration was revoked, the release was holden void. Brown. 51.

So, in debt for rent, where on the pleadings the case was, lessee for years died intestate, and administration was granted of his goods to A, who assigns this term to B, who assigns to C, who surrenders to the reversioner; afterwards a third person cites the administrator before the ordinary to repeal the administration, who confirms the same; when the third person appeals from that sentence to the dean of the arches, where the sentence is avoided, and administration granted to the appellant—whether this avoidance of the sentence should avoid all acts done by the administrator before the action was the question; and it was resolved, according to the above case, that it should not.

Syms and Syms, Raym. 224; 2 Lev. 90, S. C. by the name of Semaine and Semaine.

But after the administration is repealed, the authority of the administrator is determined; and, therefore, if he obtains judgment in an action of debt on a bond due to the intestate, and then the administration is repealed, he cannot proceed to execute that judgment; if he doth, the party will be discharged upon motion, because the execution *erronice emanavit*, for he had

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no authority but by virtue of a commission from the ordinary, and when that was determined, his authority ceased.

Barnehurst and Sir Charles Yelverton, Yelv. 83; Brownl. 91, S. C.

So, in an *audita querela*, the plaintiff says, that E P died intestate, and that Davies, the now defendant, had administered his goods, and that some of the money came to the plaintiff, and that Davies, as administrator, brought trover and conversion for the money, and had judgment to recover, and before execution sued, the administration was repealed and granted to another, and that notwithstanding he threatens to take the now plaintiff in execution, upon which there is a demurrer; and the question was, Whether, seeing the trover was for a wrong done in the administrator's time, and for which he might have declared in his own name, without naming himself administrator, and shall pay costs if it goes against him, whether he shall not take out execution after the administration is repealed? and the whole court held, that he could not; for though it be a wrong done to the administrator, yet when the money is recovered, it is assets, and the second administrator must be put to another action, to recover it out of his hands, which is a circuity the law will not allow.

Turner v. Davies, 2 Saund. 137; Mod. 62; 2 Keb. 668, S. C.

14. *What Things an Executor may do before Probate of the Will.*

An executor derives all his interest from the (a) will; and as it is that which gives him a right, so there are several acts which he may do, and which will be valid, though done before probate; for though the spiritual court may compel him to come in and prove the will, or renounce the executorship; yet this is only looked upon as (b) a ceremony, which he may comply with after several acts done by him.

Off. of Exec. 33; Godolph. 144; Ro. Abr. 917; 5 Co. 27; Co. Litt. 292. (a) But an administrator derives his whole authority from the ordinary, and therefore can do no act, unless he has letters of administration granted to him. Salk. 303; Skin. 87, pl. 5. (b) That, however, proving the will is necessary, because thereupon an inventory is to be exhibited, and other acts to be done, which are for the benefit of executors and legatees. Hut. 30.

Therefore, an executor, before probate, may possess himself of the testator's goods, and may enter into the house of the heir (if not locked) and take specialties and other securities for money due to the testator.

Off. of Exec. 33; Godolph. 144; 2 And. 151; Plow. 277.

So, an executor, before probate, may pay debts and legacies, receive debts, make acquittances and (c) releases of debts due to the testator, and take releases and acquittances of debts owing by the testator.

Off. of Exec. 33, 34; 5 Co. 28. (c) Where a release given by an executor for a particular purpose, though it contained general words, yet was holden to extend only to the things intended to be released, vide 2 Lev. 214. Morris and Wilford, 2 Mod. 108; 2 Jon. 104; 2 Show. 46, pl. 32; 3 Keb. 814, 810, S. C.

Also, an executor, before probate, may sell, give away, or dispose, as he thinks proper, of the goods and chattels of the testator.

Off. of Exec. 34.

So, an executor, before probate, may assent to a legacy, and such assent shall vest the interest in the legatee.

Off. of Exec. 34.

So, if a bond be made payable to the testator, with a certain penalty, that it shall be paid by such a day, and the testator dies before the day, the

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principal sum must be paid his executor by the day, although he did not prove the will by that day; otherwise the penalty is forfeited.\*

Off. of Exec. 34. \* But now the penalty is saved by bringing principal, interest, and costs into court, by 4 Ann. c. 16, § 13.

Upon this foundation, that is the will which vests an interest in the executor, it is clearly agreed, that an executor may, before probate, commence an action in right of the testator, but he cannot declare before probate; for without producing his letters testamentary he cannot assert his right in court; but as soon as he has these, the impediment is (a) removed *ab initio*.

Ro. Abr. 917; Raym. 481; Salk. 302; S. P. admitted, Comb. 371. (a) But if A be arrested at the suit of an executor, before probate of the will, and after pay money to a stranger, and continue two months in prison, the arrest *quoad* the stranger is illegal, and A shall not be adjudged a bankrupt from that time, so as to avoid the payment made to the stranger; for though the arrest, as to the executor and party, is lawful; yet it is good only by relation; but no such relation shall prejudice a third person. 3 Lev. 57; Duncomb and Walter, Raym. 479; Vent. 370, S. C.; Skin. 22, 87, pl. 5, S. C.

[So, it hath been holden, that an executor may file a bill in equity before probate, and that the subsequent probate makes the bill a good one. And it was said in a late case (b) in the Exchequer, *arguendo*, that it had been determined by that court about three years ago, that it was sufficient if the probate were obtained at any time before hearing.

Humphreys v. Humphreys, 3 P. Wms. 351. (b) Patten, Executrix, v. Panton, 1793. In this case of Patten v. Panton, to a bill by the plaintiff as executrix, for an account of money which the defendant was charged with having embezzled; and that certain annuities purchased by the plaintiff in the 5 *per cents.* might be transferred to the plaintiff; the defendant pleaded that no probate had been granted, and that a suit was depending between the plaintiff and defendant touching the right of the plaintiff to probate. The court gave no judgment upon the argument, and the case was never afterwards moved.

Also, an executor, before probate of the will, may maintain trespass, (c) trover, or detinue for the goods of the testator, and declare as of his own possession.

Off. of Exec. 35; 8 Co. 144; Yelv. 33, 83, 125; Cro. Car. 208, 227; Salk. 302. (c) May maintain trover in his own name before the seizure of the goods or the probate of the will. Carth. 154, *per Curiam*.

So, where a reversion for years comes to an executor from his testator, || he may avow without probate for the rent which accrued after the testator's death, though not for such as accrued before.

Salk. 302; 7 T. R. 359.

So, he may maintain actions upon contracts either actually made with him subsequent to the death of the testator; or arising by implication of law, as *assumpsit* for the goods sold by him, or for money due to the testator, and received by the defendant after the testator's death.

Anon. 1 Ventr. 109; Bollard v. Spencer, 7 T. R. 358; Harris v. Hanna, Ca. temp. Hardw. 204; Cockerill v. Kynaston, 4 T. R. 277; Nicholas v. Killigrew, 1 Ld. Raym. 436; Toll. Executors, 48.||

So, if an executor be entitled to the next presentation to a church which becomes void, and he grant it to another, the grantee may maintain *aquare impedit* for it without producing the probate of the will; for the executor himself, before probate, might have maintained this action on his own possession.

Off. of Exec. 35.

The property of a testator vests in the executor from the time of his death;

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and therefore, where an executor under one will obtained probate, and afterwards the executor appointed by a subsequent will obtained probate, (the first probate being revoked,) the rightful executor was held entitled to recover in trover against the other executor the full value of goods of the testator, sold by him after notice of the second will, and the first executor was not entitled to show, in reduction of damages, an administration of assets.

Woolley v. Clark, 5 Barn. & A. 744.

In trover for a chattel claimed by the plaintiff as vendee of an executor, the will is not evidence of the title of the executor. The probate must be produced.

Pinney v. Pinney, 8 Barn. & C. 335.

The title of three, claiming as executors, is well evidenced by the probate granted to one only of the will appointing them all.

Walters v. Pfeil, 1 Moo. & Malk. 362.

To get money out of the Court of Chancery, however small the amount, a prerogative probate is necessary.

Thomas v. Davies, 12 Ves. 417.

Where personal property is bequeathed to the executors as trustees, the probate of the will is an acceptance of the trusts.

Mucklow v. Fuller, 1 Jac. 198.¶

(F) What persons are entitled to Administration.

BEFORE the statute of West. 2, c. 19, the ordinary had the absolute disposal of intestates' estates; and as that statute first subjected them to an action at the suit of creditors; so from thence they found, as my Lord North observes, that what was before very beneficial to them began to be very troublesome, which obliged them to put the administration into other hands, taking security to save them harmless from suits.

Raym. 497.

But this method did not entirely free them from the trouble they had before; for such persons, being looked upon as servants, or attorneys to the ordinaries, could not sue for, nor gather in the intestate's estate.

2 Inst. 397; Co. Litt. 133; Ro. Abr. 906.

But they were eased herein by the statute 31 E. 3, c. 11, which enacts, "In case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods, which deputies shall have an action to demand and recover, as executors, the debts due to the said person intestate in the king's court, for to administer and dispend for the soul of the dead, and shall answer also in the king's court to others to whom the said dead person was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the ordinaries, as executors be in case of testament."

And by the 21 H. 8, c. 5, § 3, ¶ "In case any person die intestate, or the executors named in any testament refuse to prove the said statement, then the ordinary, or other person having authority to take probate of testaments, shall grant the administration of the goods of the testator, or person deceased, to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good." "And in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased; and

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where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred, as is aforesaid; in every such case the ordinary to be at his election and liberty to accept any one or more making request, where divers do require the administration." § 4. Or where but one, or more of them, and not all being in equality of degree, do make request, then the ordinary to admit the widow, and him or them only making request; or any of them at his pleasure."||

Hereupon the common law was to judge who were the best friends; and therefore if there were husband and wife; in default of them, son or daughter; in default of them, or their children, father or mother; in default of them, brothers or sisters; in default of them, or their children, uncles or aunts; the ordinary was compellable to grant administration to them in their several orders.

Raym. 498.

But, as they had a liberty by the statute of granting administration to the wife or next of kin, so also had they a liberty, where there were several in an equal degree of kindred, to prefer whom they pleased, which liberty they made use of on pretence of avoiding confusion, and was a matter of great advantage to their jurisdiction; for hereby they chose him that was most obsequious to them; and when they called him to account upon pretence of bestowing the overplus for the good of the deceased's soul, (a device in those popish times to make profit for the clergy,) they disposed of the overplus as their own.

Raym. 498.

But it came afterwards to be solemnly (a) resolved, that the ordinary, after administration granted by him, could not compel the administrator to make distribution; and it being very unreasonable that one person should run away with the whole personal estate, though there were several others in equal degree of kindred with him; this mischief was remedied by the 22 & 23 Car. 2, c. 10, which allows all those who are in equal degree to come in for a distributive share, though one only, or though a creditor or stranger takes out administration.

(a) Hob. 83, 191; Cro. Car. 62, 202; Jon. 228.

It seems to have been always holden, (b) that the husband was entitled to administration as best friend to his wife, within the words of the statute 31 E. 2, st. 1, c. 11; but there being some doubt, whether since the statute of 22 & 23 Car. 2, c. 10, he was not obliged to make distribution amongst the rest of her kindred, it was thought proper to settle this matter by a subsequent law.

4 Co. 51 b, Ognel's case; Ro. Abr. 910; Cro. Car. 106; Show. 351; Sid. 409. [(b) This exclusive right of the husband to administer to his wife is controverted by some. Cro. Car. 106. Others conceive him entitled within the equity of the stat. 21 H. 8, whereby the ordinary is directed to grant administration of the husband's effects to the wife, or next of kin, or to either. Vin. Abr. tit. *Executors*, (K) pl. 4; Moore, 871. Others support his claim, by the statute of 31 E. 3, not as described *eo nomine* in that statute, but as comprehended within its general provision. 1 Salk. 36; Vin. Abr. tit. *Executors*, (E), (K), pl. 4, (M, 9), pl. 27; 1 Show. 327; 1 P. Wms. 344; Fettiplace v. Georges, 1 Ves. jun. 9. Others hold, and among them is Lord Chancellor Loughborough, (Watt v. Watt, 3 Ves. 246,) that the husband is entitled at common law, *jure mariti*, and that his right is not derived from any of the statutes, but, on the contrary, though it derives support from them, it exists independently on them all. Com. Dig. tit. *Administrator*, (B, 6); 2 Bl. Comm. 515; 4 Co. 516; Ro. Abr. tit. *Executor*, (K).]

And accordingly, by the 29 Car. 2, c. 3, § 25, it is enacted, "That

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neither the said statute 22 & 23 Car. 2, c. 10, nor any thing therein contained, shall be construed to extend to the estates of feme covert that shall die intestate,<sup>(a)</sup> but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said act."

[(a) For a feme covert may make a will with the consent of her husband, and in such case, he cannot be entitled to administration. *R. v. Bettesworth*, 2 Str. 1112; *Marshall v. Frank*, Pr. Ch. 480; *Gilb. Eq. Rep.* 143, S. C. He may, indeed, administer to her notwithstanding a will, if she have power to dispose only of part of her property. *R. v. Bettesworth*, 2 Str. 891.—In case of the husband's death *after* the wife, the administration must be granted to his next of kin. *Squib v. Winn*, P. Wms. 378; *Bacon v. Bryant*, 11 Vin. Abr. tit. *Executors*, (K) pl. 25; *Humphrey v. Bullen*, *Ibid.* pl. 26; *Elliott v. Collier*, 3 Atk. 526; 1 Ves. 15; 1 Wils. 168; *Bouchier v. Taylor*, *Hargr. Law Tracts*, 443; 7 Br. P. C. 414.]

Also, since the statute 22 & 23 Car. 2, c. 10, the ordinary may grant administration to the wife or next of kin, at his election, but then she must have her distributive share: also, the ordinary may grant administration *quoad* part to the wife, and as to the other part to the next of kin; in which case neither can complain, since the ordinary need not have granted any part of the administration to the party complaining.

*Sid.* 179; *Raym.* 93; *Show.* 351; *Salk.* 36; 3 *Danv.* 407, pl. 1; *Holt*, 42, pl. 1.

β When the next of kin is abroad, administration should be granted to his nominee.<sup>(b)</sup> But when he resides in a hostile country, it should be granted to the next of kin in the state.<sup>(c)</sup>

(b) *Ritchie v. M'Auslan*, 1 *Hayw.* 220. (c) *Cartley v. Webb*, 1 *Car. Law Rep.* 247.

The widow applied for letters of administration, when it appeared that she was under the influence of a person who was largely indebted to the estate, and who was charged with combining with the intestate in his lifetime to defraud his creditors, and that such application was made at the instance of such debtor, and not to protect the interest of the widow: held that she was an unsuitable person to administer.

*Stearns v. Fiske*, 18 *Pick.* 24.*g*

|| Although a feme covert be entitled to the administration, yet she cannot administer without her husband's permission, because he is required to enter into the administration bond, which she is incapable of doing. If it can be shown by affidavit, that the husband is abroad, or otherwise incompetent, a stranger may join in such security in his stead. In either case the administration is committed to her alone, and not jointly with her husband; else, if he should survive her, he would be administrator, contrary to the meaning of the act.

*Toll. Exors.* 91; 2 *Bl. Rep.* 801; *Vin. Abr.* tit. *Executors*, (K); *Com. Dig.* tit. *Administration*, (D); 4 *Burn's E. L.* 241; 3 *Salk.* 21; *Sty.* 75.

If it were committed to them jointly, during coverture only, it might, perhaps, be good, because, if committed to the wife alone, the husband, for such period, may act in the administration with or without her assent; and therefore the effect of the grant seems in either case the same.

1 *Salk.* 306; 2 *Bl. Rep.* 801.||

If there be a grandfather, father, and son, and the father die intestate, the son shall have the administration, and not the grandfather, though they be both in equal degree,<sup>(d)</sup> as to nearness of kindred.

2 *Vern.* 125, said *arguendo*. [(d) For the proximity of degree is reckoned according to the civilians. *Pr. Ch.* 593; 2 *Ves.* 215.]

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[If there be neither father nor son of the intestate, the next in succession are (a) brothers and grandfathers; these are followed by (b) uncles, or nephews, and the females of each class respectively, who must, as equally near, take *per capita*, and not *per stirpes*; and lastly cousins.

(a) Blackborough v. Davis, 1 P. Wms. 40; Woodroffe v. Wickworth, Pr. Ch. 527. (b) Durant v. Prestwood, 1 Atk. 454; Loyd v. Trench, 2 Ves. 215.

A brother of the half-blood shall exclude an uncle of the whole blood, for the half-blood are of the kindred of the intestate; and the ordinary may grant administration to the sister of the half, or brother of the whole blood at his discretion.

Croke v. Watt, 2 Vern. 124; Show. P. C. 108.

If none of the kindred will take the administration, it may be granted to a creditor.

Bac. Elm. 80; 1 Salk. 38.

If the executor refuse, or die intestate, the administration is to be granted to the residuary legatee, in exclusion of the next of kin.

Pierce v. Parks, 1 Sid. 281; Thomas v. Butler, 1 Vent. 216. Letters of administration may be granted to natural children, being residuary legatees, instead of the widow. Govane v. Govane, 1 Har. & M'Il. 346.

In defect of all these, the ordinary may commit administration, as he might have done before the statute of Edw. 3, to such discreet person as he approves of, or may grant letters *ad colligendum bona defuncti*.

Plowd. 278 a.

If a bastard, (who hath no kindred, being *nullius filius*,) or any one else that hath no kindred, die intestate, and without wife or child, it hath been formerly holden, that the ordinary could seize his goods, and dispose of them to pious uses: but the usual course now is, for some one to procure letters patent, or other authority from the king, and then the ordinary of course grants administration to such appointee of the crown.

Manning v. Napp, 1 Salk. 37; Jones v. Goodechild, 3 P. Wms. 33. See Doug. 542.]

(G) In what (c) Manner the Ordinary may grant Administration; and herein of granting it to one or more, or for a particular Thing.

THERE hath been some (d) doubt whether the ordinary could grant administration to one during the absence of the person appointed executor. The reasons offered against it were, that his authority herein was entirely regulated by the statutes, which mention no such administrator; that creditors would be put to great hardships, in being obliged at their peril to take notice of the return of such absent person, which determining the authority of the administrator, would put them under a necessity of commencing their actions anew, which would be great delay and expense to them: but notwithstanding these reasons, it is now clearly (e) agreed, that the ordinary may grant administration during the absence of another, and that for the same reasons for which he may grant administration during the nonage of an infant executor, or one entitled to administration; for without this power the inconveniency to creditors would be much greater, in that there would be no person against whom they could commence their actions, nor any one to take care of the deceased's estate or effects.

(c) Whether a person's giving security and an entry in the registry of the administration, be sufficient without taking out letters of administration, vide Show. 406, &c. (d) 4 Mod. 15. (e) 5 Co. 9; Sid. 185; Keb. 682; and by 1 Ro. Abr. 90, if the person entitled to administration be outlawed, in prison, or beyond sea, the ordinary may grant



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administration to another, for which is cited 34 H. 6, 14; and vide Salk. 42, pl. 11. See 3 Salk. 23; 2 Ld. Raym. 1071; 6 Mod. 304; Lutw. 342, S. P. admitted. {See also 3 Bos. & Pul. 26, *Taynton v. Hannay*; 7 Ves. J. 460, *Rainsford v. Taynton*.}

|| And by the stat. 38 G. 3, c. 87, "if at the expiration of twelve calendar months from the death of any testator, the executors or executor to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of his majesty's courts of law and equity, it shall be lawful for the ecclesiastical court, which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee, grounded on an affidavit therein mentioned, stating the nature of his demand, and the absence of the executor, to grant such special administration in the form therein set forth."||

Also, there appears to have been some doubt whether the ordinary could grant administration *pendente lite* of a will; and in Moore it is said, *semble per Cur.* that he could not.

Moore, 606, Robin's case: but in 2 Show. 69, it seems to be taken for granted, that there may be an administrator *pendente lite* of a will; for there the question was whether such an administrator was liable to an action; and said to be clearly agreed that he was, for that he was fully administrator for the time. Vide *infra*.

And in Carthew it is reported as the opinion of the court, that administration *pendente lite* concerning a will is utterly void, and a difference there taken, where there is a controversy in the spiritual court concerning the right of administration, and where it is concerning a will; for in the first case an administration granted *pendente lite* is good; but it is otherwise where the controversy is concerning a will, for he who comes in under a will shall avoid all that which an administrator can do.

Frederick v. Hook, Carth. 153.

But this matter came fully to be considered in a late case, in which it was determined, that the ordinary may grant administration *pendente lite* of a will, and that it depended on the same reasons by which he is enabled to grant administration *durante minoritate* or *absentiâ*.

Mich. 1731, between Wollaston and Walker, 2 P. Wms. 576; Fitzgib. 202; Barnard. K. B. 423; 2 Str. 917. || But the jurisdiction of a court of equity to protect the property by the appointment of a receiver pending a litigation for probate or administration in the ecclesiastical court, is not ousted by this power in that court to grant administration *pendente lite*. King v. King, 6 Ves. 172; Atkinson v. Henshaw, 2 Ves. & Beam. 85; Ball v. Oliver, Ibid. 96; Gallivan v. Evans, 1 Ball & Beat. 191; Phipps v. Steward, 1 Atk. 285; Wills v. Rich, 2 Atk. 285. But Knight v. Duplessis, 1 Ves. 325, and Richards v. Chave, 12 Ves. 462, *contr.*|| [*Lis pendens* about the will is a good return to a mandamus to grant a probate, Andr. 366, or administration. 4 Burr. 2295; 1 Bl. Rep. 640.]

|| The authority conferred by letters of administration *pendente lite* is merely to collect the effects and to pay debts. Such an administrator has nothing to do with the will; he is only to hand over the assets to the person entitled, or to dispose of them pursuant to the directions of a court of equity. He has no authority to pay legacies; though, if paid *bonâ fide*, a court of equity will allow him for it.

Adair v. Shaw, 1 Sch. & Lefr. 243.||

The ordinary may grant administration to two, or more, and if one of them dies, yet the administration does not cease; for it is not like a letter of attorney to two, where by the death of one the authority ceases; but it is rather an office, and administrators are enabled to bring actions in their own names, for they come in the place of executors, and therefore the office survives.

Adams v. Buckland, 2 Vern. 514; Hudson v. Hudson, Ca. temp. Talb. 127; Eyre v. Countess of Shaftesbury, 2 P. Wms. 121.

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(G) In what Manner Ordinary may grant Administration.

Also, the ordinary may grant administration as to a particular thing or place to one, and so of another part of the intestate's estate to another; but he cannot grant several administrations for one and the same thing; as, if the intestate leaves a bond debt of 100*l.*, or a horse, &c.; for these things being entire things, it would be absurd, that two persons should have a right to them.

Ro. Abr. 908; Salk. 36, pl. 2.

|| Administration may be also granted on condition, as, where a former grantee is outlawed, and in prison beyond sea, it may be committed to another, but so as if the first grantee shall return, he shall be entitled to administer.

Com. Dig. tit. *Administrator* (B. 7.); Ro. Abr. tit. *Executors*, (D) pl. 2.

By st. 55 G. 3, c. 184, § 38, "no ecclesiastical court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, or solemn affirmation in the case of Quakers, that the estate and effects of the deceased for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estates for years of the deceased, whether absolute or determinable on lives, if any, and without deducting any thing on account of the debts due and owing from the deceased, are under the value of a certain sum to be therein specified, to the best of the deponent's or affirmant's knowledge, information, and belief, in order that the proper and full stamp duty may be paid on such probate or letters of administration; which affidavit or affirmation shall be made before the surrogate or other person who shall administer the usual oath for the due administration of the estate and effects of the deceased."

The affidavit, which is in the 2d section, states the nature of the demand upon the estate, that the only executor capable of acting is out of the jurisdiction, and that the deponent is desirous of exhibiting a bill in equity, for the purpose of being paid his demand out of the assets.

By the form of the administration, as prescribed in the 4th section, it is directed that the party shall be administrator for the purpose of becoming a party to a bill or bills to be exhibited against him in any of his majesty's courts of equity, and to carry the decree or decrees of any of the said courts into effect, but no further or otherwise.

By § 4, "it shall be lawful for the court of equity in which such suit shall be depending, to appoint (if it shall be needful) any persons or person to collect in any outstanding debts or effects due to such estate, and to give discharges for the same, such person or persons giving security in the usual manner duly to account for the same."

By § 5, it is provided, that "if the executors or executor capable of acting as such, shall return to and reside within the jurisdiction of any of the said courts pending such suit, such executors or executor shall be made party to such suit, and the costs incurred by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person or persons, or out of such fund as the court where such suit is depending shall direct."

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(G 2) Of the Force and Effect of Letters Testamentary, &c.

The administration under this statute being, not for a limited time, but for a limited purpose, must continue until that purpose be effectually answered. It does not cease immediately upon the return or death of the executor; for then the suit would abate, to which the act requires that the executor returning shall be made a party. The substitution must be entirely made, the administrator's accounts settled, and his expenses satisfied, before his connection with the suit is determined.

Taynton v. Hannay, 3 B. & P. 26, by two judges against Lord Alvanley, C. J. But see acc. T. C., 7 Ves. 460.||

β(G 2) Of the Force and Effect of Letters Testamentary and Letters of Administration.

In considering the force and effect of these instruments, it will be proper to consider, first, their effect generally; and, secondly, their force and effect out of the jurisdiction where they have been granted.

### 1. Of their Effect generally.

Letters testamentary are conclusive as to personal property, while they remain unrevoked; as to realty, they are merely *prima facie* evidence of right.(a) Proof that the testator was insane, or that the will was forged, is inadmissible.(b) But if the nature of the plea allow the defendant to enter into such proof, he may show that the seal of the supposed probate has been forged, or that the letters have been obtained by surprise,(c) or been revoked,(d) or that the testator is alive.(e)

(a) 3 Binn. 498; 6 Binn. 409; Wescott v. Cudy, 5 Johns. Ch. 343. (b) 16 Mass. 433; 1 Lev. 236. (c) 1 Lev. 136. (d) 15 S. & R. 42. (e) 15 S. & R. 32; 3 T. R. 130.

2. Of the Effect of Letters Testamentary beyond the Jurisdiction where they were granted.

Letters of administration granted by the archbishop of York, in England, are not sufficient authority to support an action in Pennsylvania.

Græme v. Harris, 1 Dall. 456.

A resident of Calcutta possessed stock in the American funds, which he bequeathed to his sons in trust, and died; an administrator *cum testamento annexo durante absentiâ* was appointed in Pennsylvania: in a contest for this fund it was held that the local administrator was entitled in preference to those claiming under the foreign executor.

Willing v. Perot, 5 Rawle, 264.

Administration extends only to the assets of the intestate within the state or jurisdiction where it is granted.

Doolittle v. Lewis, 7 Johns. Ch. R. 47. See Hammond v. M'Lea, 2 Johns. Ch. R. 493.

Letters of administration granted in another state have in general no force or authority.

Morrell v. Dickey, 1 Johns. Ch. R. 153; Doolittle v. Lewis, 7 Johns. Ch. 49; Williams v. Storrs, 6 Johns. Ch. 353. See Bouv. L. D., tit. *Letters Testamentary and of Administration*, where the statute law and decisions of all the states have been collected; and Livermore v. Haven, 23 Pick. 116.

The act of Congress of June, 1812, gives to an executor or administrator, appointed in any state of the United States, or in the territories, a right to recover from any individual within the District of Columbia effects or money belonging to the testator or the intestate, in whatever way they may have been received, if the law does not permit him to retain it, on account of some relations borne to the testator or to his executor,

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which defeats the rights of the executor or administrator; and letters testamentary or of administration obtained in either of the states or territories of the Union, give a right to the person having them to receive and give discharges for such assets, without suit, which may be in the hands of any person in the District of Columbia.

Kane v. Paul, 14 Pet. 33, 40.*g*

### (II) What shall be deemed the Testator's Personal Estate, or Assets in the Hands of the Executor: And herein,

#### 1. What shall be such an Interest vested in the Testator, as shall go to his Executors.

ALL the personal estate whereof the testator died possessed, whether it consists in chattels real, as leases for years, mortgages, &c., or chattels personal, as household goods, money, cattle, &c., (the first of which the civil law distinguisheth by the name of immovable goods, the latter of movable,) belong to the executors, and are (*a*) assets in their hands for payment of the testator's debts and legacies.

Off. of Exec. 52; Godolph. 180; *β*Thompson's Admr. v. Thompson's Exec., 6 Munf. 514.*g* (*a*) For assets in the hands of the heir, vide tit. *Heir and Ancestor*.

And as the executor represents the testator as to his personal estate, therefore, let the value of the thing be ever so inconsiderable, yet the executor shall have the same interest as the testator had in it; as, if the testator had dogs, ferrets, &c., they belong to the executor; and if taken from him, the law gives him the same remedy which the testator had.

Off. of Exec. 57, 58. *β*The possession of an executor is in *auter droit*; the personal estate of the deceased, therefore, including bonds, contracts, promises, and other *choses in action*, until accounted for by the payment of debts, to the amount at least of their appraised value, continue liable in the hands of the executor or administrator; and the goods or money which were of the testator or intestate, at the time of his death, are liable to be claimed in that right, so long as they are distinguishable in the hands of an executor or administrator or their representatives. Weeks v. Gibbs, 9 Mass. 74; Dawes, Judge, &c., v. Boylston, 9 Mass. 337.*g*

Also, he hath the same interest in an apprentice (*b*) which the testator had, and shall be bound according to his testator's covenant, to provide for such apprentice, &c.

Off. of Exec. 95; vide tit. *Master and Servant*. (*b*) *¶* But *qu.* the contract, in regard to instruction, being in its nature merely personal, and dying with the master. Baxter v. Burfield, 2 Str. 1266; Pearee v. Chamberlain, 2 Ves. 35. See also st. 32 G. 3, c. 57, which empowers two justices upon application within three months after the master's decease, to order apprentices with whom no more than five pounds have been paid at binding, to serve out the remainder of their time with the widow, son, daughter, brother, sister, executor, or administrator of such master, they having lived with and been part of his family at the time of his death. But, though the apprentice be not strictly transmissible, yet, if, with the consent of all parties and his own, he continue with the executor, it is a continuation of the apprenticeship, provided, in the case of a trade, it be of the same species. R. v. Stockland, Dougl. 70; R. v. Bridgford, 2 Str. 1115. The assets are liable on the master's covenant to maintain the apprentice, Cro. El. 553; 1 Sid. 216; 1 Salk. 66; but justices of the peace have, generally speaking, no authority to order an executor to maintain an apprentice; for such a jurisdiction would prevent his insisting by a plea of *plend administravit* on a deficiency of assets as an exemption. Carth. 231; 1 Show. 405. It was said by Holt, C. J., that, by the custom of London, the executor is bound to put the apprentice to another master of the same trade. 1 Salk. 66.*¶*

*β*An administratrix was charged with the profits made by four apprentices of the intestate, who worked for her after his death.

Pitt v. Pitt, 2 Cas. temp. Lee, 508.*g*

Sc, of a debtor in execution at the suit of the testator, he has an interest

(H) What deemed the Testator's Personal Estate, &c.

in the body, which is a pledge for the debt, and the prisoner cannot be discharged without the concurrence of the executor.

Off. of Exec. 46.

|| So, the testator's interest in his literary property may devolve upon the executor pursuant to several statutes.

St. 8 Ann. c. 10; 15 G. 3, c. 53; 8 G. 2, c. 13; 7 G. 3, c. 38; 17 G. 3, c. 57. *β*The act of Congress of February 3, 1831, sects. 1 and 8, vests the rights of an author in his executors, administrators, or personal representatives.*g*

So may the testator's interest in a patent granted to him for the invention of a new manufacture within the realm.

St. 21 Ja. 1, c. 3. || *β*By the act of Congress of July 4, 1836, s. 10, the executors or administrators of a deceased inventor may take out a patent. And by the 13th section of the same act, a patentee's rights are vested in his executors and administrators.*g*

And as the law lays the burden of performing the testator's will on the executor, and for that purpose gives him the personal estate; so it supposes and vests the interest in him before he has actually reduced the goods into his possession, and therefore all the testator's personal estate, how remote soever situated, is (*a*) assets in the hands of the executor.

Off. of Exec. 65; Ro. Abr. 921; 11ob. 265. (*a*) And therefore where the jury found assets in Ireland, it was holden surplusage: and that if the executor hath goods in any part of the world, he shall be charged with them. 6 Co. 47 a. *β*Administration extends only to the assets of the intestate within the state or jurisdiction where it is granted. *Doolittle v. Lewis*, 7 Johns. Ch. R. 47. See *Pratt v. Northam*, 5 Mason, 95.*g* || In *Bligh v. Darnley*, 2 P. Wms. 622, the master of the rolls doubted whether a leasehold estate in Scotland could be looked upon as personal estate in England, though he admitted that such an estate in Ireland might be so considered. || [An estate in the plantation is testamentary, and assets to pay debts. *Noel v. Robinson*, 2 Ventr. 358.]—But, if an executor lives in London, and his testator hath goods in Bristol, though the executor hath such an immediate possession of those goods, that he may maintain trover for them in his own name, and the damages recovered shall be assets in his hands; yet, if he doth not recover so much as the goods are really worth, (if there be no default in him,) he shall answer for no more than he recovers; and if the goods are perishable, and are impaired, without any default in him, either to preserve them, or to sell them at the full value, he shall not answer for the first value, but may give that matter in evidence to discharge himself; but, if he neglects to sell the goods at a good price, and afterwards they are taken from him, there the value of the goods shall be assets in his hands. 6 Mod. 181, ruled in evidence by Holt, C. J. || If an executor hath a lease for years of land of the value of 20*l.* but rendering rent of 10*l.* a year, it is assets in his hands only for 10*l.* over and above the rent. Cro. El. 712. ||

*β*The good will of a merchant is to be considered as personal property for which the executor is chargeable. (*b*) As between partners it has been held that the good will arising from a commercial partnership survives, (*c*) but that seems doubtful. (*d*) A distinction has been made between commercial and professional partnerships; the latter survive unless the benefit is excluded by positive stipulations. (*e*)

(*b*) *Worral v. Hand, Peake*, N. P. C. 94; see 9 Mod. 459. (*c*) *Hammond v. Douglass*, 5 Ves. 539. (*d*) *Crawshaw v. Collins*, 15 Ves. 227. (*e*) *Farr v. Pearce*, 3 Madd. 78. See Bonv. L. D. tit. *Goodwill*.

There are many cases where no part of the property of a testator has been employed or made use of in carrying on a business after his death, and yet the executor has been held accountable for the profits of the business as the testator's personal estate; as in the case of medical secrets or nostrums, where every thing was carried on with materials purchased after the testator's death.

*Gilbert v. Read*, 9 Mod. 459.*g*

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But debts due to the testator, whether by bond, statute, judgment, the arrears of rent, &c., are not assets till they are recovered by the executor, but only choses in action; yet, if executor releases the debt, he releases the action, and is answerable to the value.

Off. of Exec. 65; Owen, 36.

Also, as to chattels real, such as an interest for years in advowsons, commons, fairs, houses, lands, markets; these, though they go to the executor, yet is not the possession in him till he has actually entered; but a lease for years of tithes is deemed to be in the actual possession of the executor, because of this there can be no entry.

Off. of Exec. 60.

|| But, if the lease be of a rectory, consisting not only of tithes, but also of glebe lands, then it appears, that the executor is not in possession of the tithes unless he enter upon the lands.

Off. of Exec. 109.||

And as the executor's interest vests immediately upon the death of the testator, so it hath been always holden, that an executor or administrator may bring trespass for goods taken away after the testator's death, though before probate or administration granted, and that their interest shall have relation to the time of his decease.

Dyer, 110, 367 a; 5 Co. 88; Off. of Exec. 49; Comb. 451; R. v. Stone, 6 T. R. 295; Doe v. Porter, 3 T. R. 13.

But the absolute property of the goods must have been vested in the testator, so as to entitle the executors, or to make them assets in their hands; and therefore, if the testator takes a bond for another in trust, and dies, this is not assets in the hands of his executor. So, if the obligee assigns over a bond, and (a) covenants not to revoke, and dies, that bond is not assets in the hands of the executor of the obligee.

Deering v. Torrington, 1 Salk. 79. βTrusts devolving on an executor, and trust property in the hands of the deceased, kept separate, are not assets in the hands of the executors or administrators. Trecothick v. Austin, 4 Mason, 16.g (a) Where goods remain assets, notwithstanding a fraudulent bill of sale of them. Cro. Eliz. 405. [And as to creditors, see stat. 13 Eliz. c. 5, and ante.] βAn executor or administrator may sell, give away, or dispose of as he thinks proper, the personal goods of the deceased; but if there be any collusion, the heirs may set these acts aside. And the voluntary gift by an executor of the personal assets is void, when there is a deficiency. Sneed v. Hooper, Cooke's R. 200. See M'Alister v. Montgomery, 3 Hayw. 94.g

So, where an executor pleaded that he had *riens in ses mains*, but certain goods distrained and impounded; it was adjudged, that they were not assets to charge him.

Cro. Eliz. 23.

{J was in the habit of drawing bills on P, who died intestate, having accepted bills for J to a large amount, and received from him funds to answer them in part. The day before P's death, J remitted to him a further sum in bills and bank notes, to be applied towards providing for the acceptances when they became due; but the letter did not arrive till after P's death, when the bills and notes were received by his administrators. It was held that this fund was not part of the general assets, being remitted for a particular purpose, to which only it could be applied. And on the petition of the bill-holders in Chancery, and with the assent of J, it was ordered to be paid to them.

12 Ves. J. 119, Hassall v. Smithers.}

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The testator pawned his goods and the executor redeemed them with his own money, and retained them till he was satisfied; and it was adjudged, that he might retain them, the property being altered by payment to the value, and that they were not assets.

Keilw. 63. {Willes, 188.}

{Money received by an administratrix on the sale of the good will of a public house, of which her intestate was tenant, is assets in her hands.

Peake, N. P. 74, Worral v. Hand.}

{If an executor renew, he shall account for the new lease as well as the old, for the benefit of the creditors.

Anon. 2 Ch. Ca. 208.

If a man devise land to be sold, neither the money thereof coming, nor the profits thereof for any time to be taken, shall be accounted as any of the goods and chattels of such person deceased.

St. 21 H. 8, c. 5, § 5.

But, if a man devise lands to be sold by one for payment of his debts and legacies, and make the same person his executor; the money made by such person upon the sale of the land shall be assets in his hands.

1 Ro. Abr. 920.

But otherwise it is, where the land is devised to be sold by the executor and *others*; for there the money shall not be assets; for they are not trusted with it as executors.

1 Ro. Abr. 920. But it shall be assets in equity, though not at law. 1 Eq. Cas. Abr. 141. Such assets as are liable to debts and legacies by the course of law, are called *legal* assets; such as are only liable by the help of a court of equity, are called *equitable* assets. 4 Burn. E. L. 288. Yet legal assets, although they cannot be come at without the assistance of equity, shall be applied in a course of administration. Therefore, if a mere trust estate descend on the heir at law, though it may be necessary to go into equity, to reduce it into possession, yet it will be considered as legal, and not as equitable assets, a trust estate being made assets by statute. But an equity of redemption of a mortgage in fee, being merely an equitable interest, and not made assets by any legislative provision, will, therefore, be considered as equitable assets. Plunkett v. Penson, 2 Atk. 294. So, it hath been said, that if a termor for years mortgage his term, the equity of redemption will be equitable assets. Case of Sir Charles Cox's Creditors, 3 P. Wms. 342; Hartwell v. Chitters, Ambl. 308. But this last point was not in fact determined in the case of Sir Charles Cox's Creditors; and yet the case of Hartwell v. Chitters rests entirely on the supposed authority of that case. And it hath been adjudged in several preceding cases, that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets *at law* in the hands of the executor for so much as they are worth beyond the sum paid for redemption, though recoverable only in equity. Hawkins v. Lewes, 1 Leon. 155; Harcourt v. Wrenham, or Harwood v. Wrayman, Moore, 858. 1 Ro. Rep. 156; 1 Brownl. 76; 1 Ro. Abr. 920; Alexander v. Lady Graham, 1 Leon. 225. Formerly it was holden, that whatever comes to the executor's hands, or he is intrusted with, as executor, is assets at law: therefore money arising from the sale of lands devised to an executor to sell, or which he is empowered to sell for the payment of debts and legacies, were considered as legal assets, and administrable as such. Girling v. Lea, 1 Vern. 63; Greaves v. Powell, 2 Vern. 248; Anon. Ibid. 405; Cutterback v. Smith, Pre. Ch. 127; Bickham v. Freeman, Ibid. 136; Dethwicke v. Caravan, 1 Lev. 224; Burwell v. Corrant, Hardr. 405; Lord Masham v. Harding, Bunb. 339; Blatch v. Wilder, 1 Atk. 420. But modern resolutions have taken a different turn; and courts of equity have considered the real estate in such case as merely a trust fund, and distributable among the creditors *pari passu*; Anon. 2 Vern. 133; Challis v. Casborn, Pr. Ch. 408; Chambers v. Harvest, Mosel. 123; Hall v. Kendall, Ibid. 328; Lewin v. Oakley, 2 Atk. 50; Batson v. Lindegreen, 2 Br. Ch. Rep. 94. And that, though the devise be not to the executor expressly upon trust, or in trust, or as a trustee, provided there be enough in the will

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to convert the executor into a trustee, as, if the devise be to him and his heirs. *Silk v. Prime*, 1 Br. Ch. Rep. 138, n.; *Newton v. Bennett*, *Ibid.* 135; *Barker v. Boucher*, *Ibid.* 140. But, if the executor has merely a naked power to sell *quâ executor, quære*, whether the assets are legal or equitable? *Silk v. Prime*; *Newton v. Bennet*, *ubi supra*. It has indeed been holden, that if an estate descend to the heir, charged with debts, it will be legal assets. *Freemoult v. Dedire*, 1 P. Wms. 430; *Plunkett v. Penson*, 2 Atk. 290. But it is now quite settled, that in this instance also the assets shall be deemed to be equitable. *Bailey v. Ekins*, 7 Ves. 319; *Shiphard v. Lutwidge*, 8 Ves. 26. It seems then, from the above cases, that assets are considered as equitable, either in respect of the intent of the testator, or of the nature of the testator's interest in the property. In the first case, the charge upon the real estate must be for the payment of debts generally: in the latter case, the interest of the party in the property must be purely an equitable interest, and not made legal assets by any statute. 2 Fonbl. Eq. Tr. 404, n. f.] [A mere charge makes the estate equitable assets, though the descent is not broken. 7 Ves. J. 319, *Baily v. Ekins*; 8 Ves. J. 26, *Shiphard v. Lutwidge*.]

||It is now settled, that a devise of land to trustees and executors, in trust to pay debts, creates equitable and not legal assets. And a devise of an equity of redemption, to pay debts, also creates equitable assets; because the subject-matter is equitable property at the testator's death; therefore, if a mortgage land, with a power of sale by the mortgagee, on trust to pay the mortgages, and then pay over the surplus to A, his executors, or administrators, and then A die before sale, having devised his real and personal property to his executors, to sell and pay debts, &c., and the mortgagees then sell, and pay the surplus money to an agent of the executors, the executors cannot recover the money from the agent as money had and received to their use, since the money is not legally vested in them, but is equitable assets.

*Clay v. Willis*, 1 Barn. & C. 364.

By the 1 W. 4, c. 47, repealing the 47 G. 3, c. 2, § 74, the lands of a trader liable to bankruptcy, which were before assets in the hands of his heir for specialty debts, shall be assets to be administered in courts of equity for all debts, simple contract as well as specialty; specialty debts to be first paid.

The act 47 G. 3, c. 2, only applies to persons who were traders *at the time* of their decease, and the words of the new act are of the same import.

47 G. 3, c. 2; *Hitchon v. Bennett*, 4 Madd. R. 180.

All sums stated in the executor's inventory, exhibited to the spiritual court as supposed to be recoverable, are assets in his hands, unless the executor prove a demand and refusal.

*Young v. Cawdrey*, 8 Taunt. 734; 3 Moo. 66; and see *Toller on Executors, &c.*, p. 246, (6th edit.)

Executors have only power to sell the real estate where such power is expressly given to them, or necessarily to be implied from the produce being to pass through their hands in the execution of their office.

*Bentham v. Wiltshire*, 4 Madd. 44; and see 1 Jac. & Walk. 189; *Co. Litt.* 113 a.

Though testator declared to his executor, that he never meant to call for payment of a promissory note, it was held part of the assets, a charge on the real estate having failed for want of a proper attestation of the will.

*Byrne v. Godfrey*, 4 Ves. 6.

An advowson in gross is assets by descent for payment of specialty debts by common law.

3 Bro. P. C. 556; 7 Ves. 447.



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A power to raise money unexecuted is not assets, and the money cannot be raised.

Holmes v. Coghill, 7 Ves. 499.

But if the power is executed in favour of volunteers, the court lays hold of the money as assets; the equity, however, of a party purchasing of the volunteer shall be preferred to that of the general creditors having no specific charge.

George v. Milbanke, 9 Ves. 190.

A remittance to the intestate of bills and notes to honour acceptances drawn by the remitter, which came to the hands of the administrator, the intestate dying the day before it arrived, is not general assets, but is to be applied according to the remitter's specific appropriation.

Hassall v. Smithers, 12 Ves. 119.

A debt due from an executor to his testator is assets, for the same reason that he may if a creditor retain; viz. that he cannot sue himself.

Simmons v. Gutteridge, 13 Ves. 262.

By the 1 W. 4, c. 40, it is enacted, that when any person shall die, after the 1st of September next after the passing of the act, having by his will or codicil appointed any executor, such executor shall be deemed by courts of equity to be a trustee for the person entitled to the estate under the statute of distributions, in respect of any residue not disposed of, unless it shall appear by the will or codicil that the person so appointed executor was intended to take such residue beneficially.

Mence v. Mence, 18 Ves. 348.

By § 2, it is provided, that nothing therein shall affect any right to which any executor, if the act had not passed, would have been entitled in cases where there is not any person who would be entitled to the testator's estate under the statute of distributions, in respect of any residue not expressly disposed of.

By § 3, it is provided that nothing herein contained shall extend to that part of the United Kingdom called Scotland.

Where a rectory falls vacant, the advowson of which belongs to a prebendary in right of his prebend, and the prebendary dies without having presented, the presentation does not belong to his personal representative.

Rennel v. Bishop of Lincoln, 3 Bing. 223.

§ A testator appointed A B his executor and testamentary guardian of his children, with power to sell property for the payment of debts, to give property to the legatees as they should come of age or marry, and to keep the balance of the property together and cultivate the farm for the support of the widow and children, till the youngest came of age: held that after the payment of some legacies and placing the property on the farm, A B held the property as testamentary guardian and not as executor.

Drane v. Bayliss, 1 Humph. 367. See O'Neill v. Herbert, 1 M'Mullan, 495.

Whatever money or property is recovered by the executor or administrator, after the death of the testator or intestate, in virtue of his representative character, he holds as assets of the estate.

De Valengin's Admr. Duffy, 14 Pet. 282.

When a legacy is given in trust, and there is no special designation in the will of the executor or any other person as trustee, it belongs to the

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executor, as such, to administer the estate according to the provisions of the will.

Grotton, J., v. Ruggles, 5 Shepl. 137.

Money in the hands of the widow, earned and received by her before the marriage or given to her by her husband, belongs to the executor.

Washburn v. Hale, 10 Pick. 429.*g*

### 2. How far Debts due to the Testator are Assets.

All debts due to the testator, whether by judgment, statute, recognisance, mortgage, bond, &c., are assets, but the executor is not to be charged with them till he has received the money.

Off. of Exec. 65; Ro. Abr. 920; Owen, 36.

So, if the executor, in right of the testator, recovers any (*a*) damages for any trespass done to the goods of the testator, or for the breach of any (*b*) covenant or contract made with the testator; all such damages thus recovered shall be assets in the hands of the executor.

Off. of Exec. 65; Ro. Abr. 920. (*a*) So, money recovered by him, by decree in a court of equity, shall be assets. Moore, 858; Brownl. 76; 2 Chan. Ca. 152. (*b*) Though the covenant founded in the reality, as for not assuring lands, &c., yet, if it be broken in the testator's lifetime, the executor shall have the action. Off. of Exec. 65.

So, if the executor, in right of the testator, is entitled to a writ of error, attain, deceit, *audita querela*, *identitate nominis*, whatsoever is regained by any of these ways, as unduly lost by the testator, shall be assets.

Off. of Exec. 71.

[So, a debt due from an executor to his testator, is assets in equity to pay legacies.

3 Ch. Ca. 89.]

But though debts, &c., due to the testator are not assets till recovered, yet, if the executor gives (*c*) a release or acquittance for any such debt, he shall be charged in the same manner as if he had received the money. (*d*)

Hob. 66; Godb. 29; And. 138; Cro. Eliz. 43; 4 Leon. 102. βDawes, Judge, &c., v. Boylston, 9 Mass. 337. If an executor or administrator compound debts and mortgages, and buy them in for less value than is due upon them, although he do it with his own money, it shall be assets in his hands to pay debts and legacies. Idem.*g* (*c*) Where an executor lost a bond due to the testator, and a creditor having recovered judgment against him, the question came to be in equity, whether the executor was obliged to make good the debt to the testator's estate; and it being urged, that the loss of the bond was not a loss of the debt, because the same still subsisted, and might be recovered *in equity*, and that it would be hard in this case to charge the executor, when in truth the obligor was insolvent; the court directed the executor to prosecute a suit against the obligor, and respited the judgment obtained by the testator's creditor in the mean time. 2 Vern. 299. [(*d*) So, if he neglects to bring an action on a bond, he shall be charged with the amount of it. Lawson v. Copeland, 2 Br. Ch. Rep. 156.]

So, if the executor submits to arbitration (*e*) the debts or damages which he is entitled to in right of his testator, and the arbitrators award a release or discharge thereof; this being his own voluntary act, shall charge him in the same manner as if he had received the money.

Off. of Exec. 71; 3 Leon. 51. ||(*e*) The mere act of an executor's submitting to an award is not of itself an admission of assets. But, if he binds himself by a personal engagement to perform the award; or, if his submission to arbitration is a reference, not only of the cause of action, but also of the question, Whether he has, or has not assets, and the arbitrator awards him to pay the amount of the plaintiff's demand, it is equivalent to determining as between the parties, that he has assets to pay the debt.

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The award, therefore, is conclusive upon him, although it will not operate as an admission of assets in any other suit. See *Barry v. Rush*, 1 T. R. 691; *Pearson v. Henry*, 5 T. R. 6; *Worthington v. Barlow*, 7 T. R. 453.¶

If the plaintiff, as executor, and the defendant submit all controversies relating to the testator's estate to arbitration, and the arbitrators award, that the defendant shall pay the executor 300*l.*, and there is a custom of foreign attachment in London, that if a suit be commenced against the executor of any person, any debt, which was due to the testator *tempore mortis suæ*, may be attached; yet this 300*l.*, although it be assets, and shall charge the executor, shall not be within the custom; for it was not the testator's at the time of his death, and all customs are to be construed strictly.

*Horsam v. Turget*, 1 Vent. 111; Lev. 306, and 2 Keb. 716, 731, 741, S. C.; *Fisher v. Lane*, 3 Wils. 297; 2 Bl. Rep. 834.

3. *What shall be deemed the Testator's Personal Estate; and therein what Things shall go to the Heir, and not to the Executor.*

The more general division of the testator's estate is into chattels real and personal, or things immovable and movable, according to the civil law: the movable goods are again divided into things animate and inanimate: of the first, are all the testator's horses, cows, sheep, fowls, &c., which clearly belong to the executor; the inanimate things are all the testator's money, household-stuff, implements and utensils, hay, carts, ploughs, coaches, &c., and these also belong to the executor.

Off. of Exec. 53; Godolph. 120; Dyer, 383.

Chattels real, or things immovable, are such as are annexed to and savour of the freehold and inheritance; such as an interest for years in houses, lands, advowsons, commons, fairs, markets, the interest in a ward, in an estate by statute staple, merchant, or *elegit*, and mortgages; and these also regularly go to the executor.

Off. of Exec. 53; Godolph. 120.

But here it will be necessary to inquire more particularly into the nature of those things, which, from the different rules of law that govern real and personal property, will make some things belong to the heir, and others to the executor.

If the king by an attainder of felony is entitled to the *annum, diem et vastum*, which is a power of taking the profits of the offender's lands for a year, and also of committing waste in houses and cutting down trees, and he grants this to a man and his heirs; yet it shall go to the executors of the grantee, for this is but a (a) chattel.

Off. of Exec. 54. (a) So, if a man possessed of a term for years, devises it to another and his heirs, or heirs male of his body; this being but a chattel, shall go to his executors. 10 Co. 47; Yelv. 73; Fearn, 342, &c.

So, if a man possessed of a term for one hundred years, makes a lease for fifty years, reserving rent to him and his heirs, this rent determines upon his death, for the heir cannot have it, because he cannot succeed in the estate, being a chattel interest, to which the rent, if it continues after the life of the lessor, must belong; and the executors cannot have it, because there are no (b) words to carry it to them.

Vent. 161. (b) But, if a termor of one hundred years leases for fifty years, reserving rent to him and his heirs, *during the term*, the executors shall have the rent after the death of the lessor; for here the rent is made to continue *during the term*. Vent. 161.—So, if A grants a rent-charge to B for forty years, with a clause of distress to B and his heirs, *during the term*; the executor of B may distrain for it during the

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term; for the distress is expressly given *during the term*, and therefore must belong to the executor, who has a right to the rent-charge, being a *chattel interest*. Cro. Eliz. 644, Darrel v. Wilson.

If a person were guardian in chivalry or knight's service, and died, the ward went to the executor; for this being an interest by reason of tenure did not determine by the guardian's death, and therefore went as a chattel to the executor. But, if a guardian in (a) socage died, the ward went neither to the heir nor executor; but, if the infant was of the age of fourteen, he was allowed to choose his guardian; and if under, the next of kin, to whom the inheritance could not come, was to be guardian.

Off. of Exec. 52. Vide tit. *Guardian*. (a) That a guardianship pursuant to the statute 12 Car. 2, c. 24, cannot be assigned, neither shall it go to the executors or administrators, being a personal trust. Vaugh. 180.

If a person purchase the next presentation to a church, and die before it becomes void; this, as a chattel, shall go to the executor, and not to the heir.

Godolph. 121; Off. of Exec. 54.

So, if there be tenant in tail, and the church happen to become vacant in his life-time, and he die before he hath presented, his executor, and not the issue in tail, shall present to this turn.

Godolph. 133; F. N. B. 33, P. acc.

But, where the case was, that a parson of the church of D purchased the inheritance of the advowson to him and his heirs, and died; and the question was, Whether the executors of the parson, or the heir should present? it was resolved, that the heir should present, and not the executors, and that it should descend to the heir, and be consolidated with the fee, by the same reason that it may be (b) devised over; for where the law makes a division of an estate, it is either in grants, *ut res magis valeat*, or in favour of ancient rights; as, where one joint-tenant devises, the devise is void, and the survivorship shall hold place, notwithstanding the devise; and if in this case there must be a construction to devise the estate, it ought to be in favour of the heir, it being no injury to the executors; for the church being void, it is not assets in their hands.

3 Lev. 47, Holt and the Bishop of Winchester. (b) Where a parson, who had the inheritance of the advowson, devised the advowson in fee to a stranger; it was resolved that the devisee should have the next avoidance. Pinchyn v. Harris, Cro. Ja. 371.

|| A grant of the next presentation of a living to J S during his life, is limited, and will not carry the presentation to his executors on his dying before the church becomes void.

Mann v. Bishop of Bristol, Cro. Car. 505; Sir W. Jon. 407, S. C.||

If a man *seised in fee* makes a gift in tail, lease for life or years, reserving rent, this rent, as incident to the reversion, shall go to the heir, and not to the executor; for since, during the continuance of the particular estate, the reversioner loses the profits of the land, the rent ought to be paid to him as a compensation for the loss.

Co. Litt. 47 a, 143; Ro. Abr. 447; 2 Saund. 369; Hard. 95.

Therefore, if A covenants and grants with B that he shall have and enjoy Black-acre for six years, and B covenants to pay to A, his heirs, executors, and administrators, an annual rent during the term; this, being a good reservation of a rent, shall, upon the death of A, be paid to his heir, who has the reversion as a retribution for the profits of the land, which he

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cannot enjoy during the term ; and the executors of A shall never have any thing by virtue of the covenant, though it is in express words granted to A and his executors.

Drake v. Munday, Cro. Car. 207.

So, if A, being *seised in fee*, makes a lease, reserving rent to him and his executors and assigns, and dies, this rent is determined ; for the executors cannot have it, being strangers to the reversion, which is an inheritance, and therefore, being never to enjoy the profits of the land after the expiration of the term, can never have a right to a retribution or compensation for them.

Co. Litt. 47 a ; 2 Ro. Abr. 450.

But, if a man *seised in fee* makes a lease for years, reserving rent to him and his assigns during the term, this reservation shall not determine by the death of the lessor, but the rent shall go to his heir ; for though there be no mention of the heirs in the reservation, yet there are words that evidently declare the intention of the lessor, that the payment of the rent shall be of equal duration with the lease, the lessor having expressly provided, that it shall be paid during the term ; consequently, the rent must be carried over to the heir, who comes into the inheritance after the death of the lessor, and would have succeeded in the possession of the estate, if no lease had been made : and if the lessor assigns over his reversion, the assignee shall have the rent as incident to it, because the rent is to continue during the term, and therefore must follow the reversion, since the lessor made no particular disposition of it separate from the reversion.

Sury v. Brown, Latch, 99 ; 2 Ro. Abr. 451, S. C., ill reported to the contrary ; but Vent. 163, S. C. cited, and admitted to be law ; 3 Bulstr. 328, S. C.

So, if a lease be made for years, reserving rent during the term to the lessor, his executors and assigns ; this, by a late (*a*) resolution, shall not determine upon the death of the lessor, but shall go to the heir ; because the reservation being to the lessor and his assigns, during the term, (for the words, executors and administrators, are void, the lessor having the inheritance,) such express words evidently discover the intent of the contract, and that the lessee agreed and bound himself to the payment of the rent during the continuance of the demise.

(*a*) Sacheverel v. Frogate, reported in Vent. 161, 162 ; 2 Saund. 367 ; Raym. 213 ; 2 Lev. 13, and therefore the case Cro. Eliz. 217, Richmond and Butcher, to the contrary, is not law ; and vide 5 Co. 115 a.

But though rent, as incident to the reversion, shall go therewith, and be payable to the heir, yet the arrearages, which incurred and became payable in the lifetime of the testator, shall go to the executor as part of his personal estate.

Godolph. 121 ; Off. of Exec. 53, 54.

But, if a lease be made, reserving rent at Michaelmas, or ten days after ; if the rent is not paid at Michaelmas, and before the ten days are expired the lessor dies, the heir, and not the executor, shall have the rent ; for though it was in the election of the lessee to pay the rent at Michaelmas, yet the ten days after are the true legal term, so that the rent was not legally due before that time, and therefore no chattel. So, if the lessor dies on the day on which the rent is to be paid after sunset, and before midnight, the heir, and not the executor, shall have the rent ; for it is not due till the utmost limit of the day, which ends not till twelve o'clock, though the

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time for demanding it for conveniency be a convenient time before the sun sets.\*

10 Co. 127; Cro. Jac. 309, 310; Cro. Eliz. 575; Moore, pl. 1012; Yelv. 167. \*At the death of tenant for life, a proportionable part of the rent shall be paid to the executors. 11 G. 2, c. 19, § 15.

As to *things fixed to the freehold or parcel thereof*, how they may become chattels, and go to the executor, or are to be considered as part of the inheritance, and to descend to the heir, it is necessary to observe,

That though the thing be a chattel in itself, yet if it cannot be removed or severed without prejudice to the inheritance, there it shall descend and belong to the heir, and not to the executor.

Ro. Abr. 919; Off. of Exec. 62. *β*A still, not fixed to the freehold, which could be removed without injury to the house, is personal property, and goes to the executor. *Crenshaw v. Crenshaw*, 2 Hen. & Munf. 22.*g*

As, if a man erects a furnace in the middle of a floor, though it doth not depend upon any wall; yet it goes to the heir with the land, and not to the executor as a chattel, for it is to be esteemed (*a*) parcel of the house, there placed on purpose by the ancestor, to descend as the law would carry it.

21 H. 7, 26, 27; Keilw. 88. (*a*) But, if a person, who hath a particular interest in the house, doth annex any thing to the same for the benefit of his own trade, he may disunite it during the continuance of that interest, if it may be done without any destruction or disadvantage to the freehold; and, therefore, if a dyer, being a termor for years, erects a furnace in the middle of the floor, not affixed to any wall, he may take it down during his term, because such trader erects for the use of his trade, and is owner both of the floor and the furnace, and it may be disunited and altered without prejudice to the landlord. 20 H. 7, 13; 21 H. 7, 27; Owen, 70, 71.— But, if he doth not take it down during the term, it goes to him in reversion, because he is not master of both those things that are to receive alteration. 21 H. 7, 27; Owen, 70; Off. of Exec. 61.

The same law of coppers, leads, vats for dyers or brewers, || salt pans set up in wyche-houses, || pales, posts, rails, windows, whether of glass or otherwise, benches, wainscots, doors, locks, keys, millstones, anvils, &c.; for these being fixed to the freehold are not chattels, but parcel of the freehold.

Off. of Exec. 62; 4 Co. 63, 64; 3 Atk. 16.

And though pictures and looking-glasses are esteemed part of the personal estate, yet if they are put up instead of wainscot, or where otherwise wainscot would have been put, they shall go to the heir; for the house ought not to come to the heir maimed and disfigured.

2 Vern. 508, so ruled in equity. [But this doctrine, as to annexation to the freehold, hath been gradually relaxing for a long time; and if things of the kind above mentioned can be taken away without prejudice to the fabric of the house, the executor, it seemeth, shall have them. This relaxation hath been made upon reasons of public benefit and convenience. *Lawton v. Lawton*, 3 Atk. 14; *Lord Dudley v. Lord Ward*, Ambl. 113; *Harvey v. Harvey*, 2 Str. 1141.]

As to the timber trees, they originally belong to the soil by right of accession; yet if a man sells the timber trees on his soil, the executors of the vendor (*b*) shall have them, and not his heir: so, if a man sells his land, reserving the timber trees, they remain by particular contract as a chattel in him, distinct from the soil, and shall go to his executors.

4 Co. 62; Off. of Exec. 60. [(*b*) This must be understood of tenant in fee simple; for such a sale by tenant in tail would not be effectual without docking the entail, unless they were actually felled in the lifetime of such tenant, for otherwise they descend with the land to the issue in tail. Hob. 173; 11 Co. 50 a.]

And as the trees, unless severed, belong to the heir, so does the fruit

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which they bear, as apples, pears, &c., belong to the heir : also, grass growing, though fit to be mowed down for hay, shall, with the land, descend to the heir.

Off. of Exec. 59 ; Godolph. 122.

But corn, though growing, as also every thing else of that kind which is produced annually by labour and cultivation, shall go to the executor, and not to the heir, as hops, saffron, hemp, &c.

Off. of Exec. 59. *β*Penhallow v. Dwight, 7 Mass. 34.*g* [If lessee for life of a hop-ground dies in August before severance of the hops, the executor may maintain trover for them against the remainderman, though growing on ancient roots. *Latham v. Atwood*, Cro. Car. 515 ; *Hargr. Co. Litt.* 55 b, n. 1, *Hal. MSS.*]

{Yet they belong to the devisee of the land, and not to the executor. And a devise of goods, stock, and movables shall take them from both.

*Buller*, 34 ; *Gilb. Ev.* 214, 215 ; *Winch.* 51, *Spencer's case* ; 6 East, 604, n., *Cox v. Godsalve*, coram, *Holt, C. J.*, *Lent Assizes*, 11 W. 3 ; 8 East, 339, *West v. Moore*. Vide 1 Wash. 62, 63, *Shelton v. Shelton*.}

Also, if an inheritor of tithes dies after the tithes are set out, they go to his executor, and not to his heir.

Off. of Exec. 60.

[If disseisor sow the land of tenant for life, and tenant for life die before severance, his executors, and not the disseisor, or the reversioner shall have the corn.

*Knevit v. Poole*, *Gouldsb.* 143.

But, though the things which require labour and cultivation, and are of annual produce, regularly belong to the executor ; yet roots (*a*) of all kinds, such as parsnips, turnips, skerrets, &c., belong to the heir, for these cannot be come at without digging up the earth, which must necessarily be a spoil and injury to the inheritance.

Off. of Exec. 62, 63. (*a*) || But, if the roots be set by the testator, Lord Coke says, the executors shall have that year's crop. *Co. Lit.* 55 ; 1 Ro. Abr. 728.||

And therefore the Office of Executors says, that the executor must content himself with those things whose fruit is above ground, such as melons of all kinds ; but as for artichokes, though the fruit be above the ground, the author thinks that they have not such yearly setting and manurance as should sever them in interest from the soil, and that therefore they shall go with it to the heir.

Off. of Exec. 63. *β*Testator died in September, leaving a crop on his plantation ; held that such crop, which was severed in December, was assets in the hands of the executor. *Waring v. Purcell*, 1 Hill's Ch. 196.*g*

If a man hath fish in his pond, and die, they go to his heir, for they are considered as the profits thereof, and therefore descend with the pond to the heir.

*Co. Litt.* 8 ; Off. of Exec. 57 ; *Swinb.* 403.

But if a man has fish in his trunk or net, they go to the executor, for they are severed from the soil, and felony may be committed in stealing them.

*Co. Litt.* 8.

So, doves in a dove-house descend, together with the house, to the heir ; but the young ones, that are not able to fly out, belong to the executor.

Off. of Exec. 57.

So, deers, conies, pheasants, or partridges, if tame, or kept alive in any room, cage, or like receptacle, as pheasants and partridges often are, shall

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go to the executor: so, hawks reclaimed shall, as chattels personal, go to the executor.

Off. of Exec. 57.

As to charters and writings relating to the freehold and inheritance, they follow the interest of the land, and belong to the heir: but as to those deeds and writings which relate to terms for years, goods, chattels, or debts, they belong to the executor.

Ro. Abr. 919; Off. of Exec. 63, 64; Jones v. Jones, 3 Br. Ch. Rep. 80. [If the writings of an estate are pawned or pledged for money lent, such charters in the hands of the *creditor* are to be considered as chattels; and in case of his decease, they would go to his executor or administrator, because such personal representative would be entitled to the benefit accruing from the loan. Noy, Max. 50.]

[A bill was brought in Chancery, suggesting, that an antique horn with an old inscription had immemorially gone with the plaintiff's estate, and was delivered to his ancestors to hold their land by, and praying that it might be restored: the lord keeper was of opinion, that if the land was of the tenure called *cornage*, the heir was entitled to this monument of antiquity *at law*.

Pusey v. Pusey, 1 Vern. 273; 1 Inst. 107 a.]

β The administrator of a mortgagor is not entitled to the surplus money arising from the sale of mortgaged premises under a decree in Chancery. It belongs to the heir.

Moses v. Murgatroyd, 1 Johns. Ch. R. 119.

An equitable interest in lands, founded on articles of agreement for a purchase, descends to the heirs, and the executor must pay the purchase-money, for the benefit of the heir.

Livingston v. Newkirk, 3 Johns. Ch. R. 316.

The rents and profits of the real estate of one who has died insolvent belong to the heirs and not to the executors or administrators, until such real estate be sold for the debts of the insolvent or by order of a competent court.

Gibson v. Farley, 16 Mass. 280; McCoy v. Scott, 2 Rawle, 222; Adams v. Adams, 4 Watts, 160; 1 Miles, 220; but see contra, Storer v. Hinckley, 1 Root, 182; Hays v. Jackson, 6 Mass. 149.g

### 4. What things shall go to the Wife of the Deceased, and not to the Executor.

The law looks upon husband and wife as one person, and therefore will not regularly allow the wife to have any property separate and distinct from the husband. Hence all the personal estate, as money, goods, &c., which were the wife's, and in her actual possession at the marriage, are actually vested in the husband; so that of these he may make any disposition in his lifetime, without her consent, or may by will devise them, and they shall, without any such disposition, go to the executors or administrators of the husband, and not to the wife, though she survive him.

Doct. & Stud. Dial. 1, cap. 7; Co. Litt. 351; Sid. 111.

But chattels real, such as leases for years, estates by statute merchant, staple, *elegit*, &c., though of these he may alone dispose, forfeit, or they may be extended for his debts; yet if he makes no (a) disposition of them in his lifetime, they survive to the wife, and shall not go to the executors of the husband.

Co. Litt. 46 b, 351. Ro. Abr. 342. (a) But, if the husband makes a lease of part of the wife's *term*, reserving rent, the rent shall go to the executors of the husband; for as he had a power in his lifetime to dispose of the whole, so he might have disposed



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of any part of it. Poph. 5, 97; Co. Litt. 300; 8 Co. 97; Vent. 259.—And what shall be said a disposition by him, so as to bar the wife, vide tit. *Baron and Feme*, letter (C).

So, of *choses in action*, as debts due to the wife by obligation, &c., though these are likewise so far vested in the husband, that during the coverture he may reduce them into possession; yet if he dies before any alteration made by him, they belong to the wife, and not to the executors of the husband.

Co. Litt. 351; 3 Mod. 186.

As to the wife's *paraphernalia*, which survive to her, and go not to the executors of the husband; these by the civil law are defined *bona quæ mulier ultra dotem adfert*, and are understood to be not only her necessary apparel, but also such jewels and other ornaments as are suitable to her degree and quality. Of these, by the civil law, the wife had such an absolute property, that she might dispose of them *in vitâ mariti invito marito*, nor could the husband devise them by will from her, nor were they liable to his debts or legacies.

Godolph. 130; Swinb. 403; Cro. Car. 344.

But herein our law differs, and prohibits the wife from making any disposition of them in the lifetime of the husband; also, our law distinguishes between things of ornament and mere (a) necessity; and as to matters of ornament, subjects them to the husband's debts, and even allows the husband power to dispose of them by will.

Ro. Abr. 919; Cro. Car. 343. (a) If the husband delivers his wife a piece of cloth to make her a garment, and dies: although it is not made up in the lifetime of the husband, yet the wife shall have it, and not the executor of the husband, because it was delivered to her for this purpose: but against a creditor of her husband, she shall not have more apparel than is convenient for her. Ro. Abr. 911, Harwell & Harwell.

And therefore where the daughter of an earl, who was married to Sir John Davies, (the king's serjeant at law,) usually wore a diamond chain, value 370*l.*, and Sir John devised the use of his jewels to his wife, during her widowhood, she giving security to leave the same to his daughter, at the day of her death, or second marriage, which should first happen; the widow marrying again, it was holden by two judges against two, that these being matters of ornament, the husband had a power of disposing of them by will, and, consequently, that the limitation annexed to them in the present case was good; but they seemed to admit, that if the husband had made no disposition of them, and there had been no (b) creditors of the husband, that they should have belonged to the wife. But the other two judges held, that there was no other way of determining what ought to be accounted the wife's *paraphernalia*, or matters of ornament or necessity, but by the discretion of the judges; and that, if these were things suitable to her degree and quality, and usually worn by her as ornaments of her person, the husband could not devise them from her.

Lord Hastings v. Sir Archibald Douglass, Cro. Car. 343; Jon. 332, and Ro. Abr. 911, S. C.; 2 Vern. 245, 246, S. C., cited, where the husband devised the wife's jewels, being of great value, to the wife for life, the remainder to his son; and the wife made no election to claim them as her *paraphernalia*, held that her administrator cannot make this claim; and there said, that although, where the husband dies intestate, or without disposing of the wife's jewels by will, the wife may claim them if there are no creditors, yet she cannot against a disposition of them by her husband by will. (b) As in trover against the Viscountess Bindon, for several jewels of considerable value; she, as to all, except a chain and bracelets, not exceeding the value of 160*l.*, pleaded not guilty, and as to that she pleaded that she was the wife of Viscount Bindon, and that she usually wore those jewels as ornaments of her body; and averred, that the

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executors had assets to satisfy his funeral expenses, and all his debts and legacies besides these jewels; and on demurrer, she had judgment. Moore, 213; 2 Leon. 166, S. C.—Where the wife's *paraphernalia* being superfluities and ornaments, were in equity holden liable to the husband's debts; vide Pr. Ch. 295, 296, a good case.—But, where the wife's jewels and plate had been bought with her own pin-money, and the value did not amount to more than 500*l.*, which was esteemed but little in respect of the husband's estate, they were holden not to be liable. Pr. Ch. 27.

Also, it has been holden, that if a woman by marriage articles agrees that she shall have no part of the personal estate but what the husband gives her by his will, that this bars her of her *paraphernalia*.

2 Vern. 83.

5. *Where after Debts and Legacies paid the Executors shall have the Surplus to themselves, and are not to be Trustees for the next of Kin.*

By law the very naming of an executor is a disposition to him of all the testator's personal estate; for he comes *in loco testatoris*, and is chargeable with his debts and legacies as far as he has assets; and, therefore, the law gives him the whole personal estate; the surplus of which, after he has executed his trust by payment of debts and legacies, belongs to himself, as a recompense for his labour and trouble.

Off. of Exec. 4. *β* In Pennsylvania, an executor has always been considered a trustee for the next of kin, as to the residue of the personal property undisposed of by the testator. Wilson v. Wilson, 3 Binn. 557; unless it appears to have been the intention of the testator that it should be otherwise. Grasser v. Eckart, 1 Binn. 575. See Noave's case, 9 S. & R. 189.*g* {2 Dall. 268, Boudinot v. Bradford; 1 Bin. 579, 580, 584; 1 Wash. 64, Shelton v. Shelton. If there are several executors, they take a joint interest, which, if not severed, will survive. 12 Ves. J. 298, Griffiths v. Hamilton.}

But, though the executor be entitled to the surplus of the personal estate undisposed of, yet, if there be any fraud in obtaining the executorship, or if it appear manifestly to have been the intention of the testator, that the executor should not have the surplus to his own use, a court of (*a*) equity may decree such executor a trustee for the next of kin to the testator, and that the surplus shall go according to the statute of distributions. (*b*)

Vern. 473; 2 Vern. 676; Abr. Eq. 243. || (*a*) As, if the testator expressly declare, that the executor shall be only a trustee; or there be any thing in the will serving as an intimation of an idea, that the testator was not making a beneficial office, but merely a trust. Pring v. Pring, 2 Vern. 99; Cordell v. Noden, Ibid. 148; 1 Eq. Ca. Abr. 244, S. C.; Pr. Ch. 12, S. C.; Graydon v. Hicks, 2 Atk. 18; Cook v. Duckenfield, Ibid. 567; Read v. Snell, Ibid. 645; Androvin v. Poilblanc, 3 Atk. 300; Dean v. Dalton, 2 Br. Ch. Rep. 634; Bennet v. Batchelor, 3 Br. Ch. Rep. 28; 1 Ves. jun. 63, S. C.; De Mazer v. Pybus, 4 Ves. 644; Urquhart v. King, 7 Ves. 230; Selley v. Wood, 10 Ves. 71. And this, though he neglect to declare the trust, Bp. of Cloyne v. Young, 2 Ves. 91; or the trust declared fail, Morice v. Bp. of Durham, 9 Ves. 399; 10 Ves. 522. So if the will contain a residuary clause, but the name of the residuary legatee be omitted, Bp. of Cloyne v. Young, *ubi supra*; Lord North v. Purdon, 2 Ves. 495; Hornsby v. Finch, 2 Ves. jun. 78; or the residuary clause be erased and illegible, 2 P. Wms. 158; or an ulterior disposition of the residue be reserved, but not made, Mordaunt v. Hussey, 4 Ves. 117; Wheeler v. Sheer, Mosel. 288, 302; or the residuary legatee die in the testator's lifetime, Nicholls, Ambl. 769; Bennet v. Batchelor, 3 Br. Ch. Rep. 28; or the testator has begun to make a further disposition, but broken off in the middle of the sentence, though the nature of such disposition, whether residuary or not, be unknown. Knewel v. Gardiner, Gilb. Eq. Rep. 184; 2 Ves. 100, S. C. cited. (Note, in this case the executor had a legacy.) For the proposition, that the appointment of executor gives him *every thing not disposed of* is not admitted in a court of equity. In the strongest way of putting it, it can only be *what the testator does not mean to dispose of*. By Lord Eldon in Dawson v. Clarke, 18 Ves. 254. The case of a lapse would seem to admit a distinction; though Lord Eldon is made to say in Dawson v. Clarke, that in that case the executor shall not take. Where indeed the whole residue lapses

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there can be no doubt but he is excluded, *Bennet v. Bachelor, ubi supra*; but if it be a lapse of a mere legacy, and there be no residuary legatee named, no intention on the face of the will to exclude the executor, it would seem to fall into the residue, and so become his property as the legal residuary legatee: for there can be no difference between a residuary legatee by operation of law and one by express designation; the rights of both must be the same. See *Wilson v. Ivat*, 2 Ves. 166; *Pratt v. Sladden*, 14 Ves. 199; *Dawson v. Clarke*, 15 Ves. 417, and what is said by Lord Thurlow in 1 Ves. jun. 67.—But the appointment of executors as trustees of part of the property, and giving them the appellation of trustees, evidently with reference to that trust, will not exclude them from the residue. *Batteley v. Windle*, 2 Br. Ch. Rep. 31; *Pratt v. Sladden, ubi supra*. || {Or if, by codicil, the testator directs that the residue shall be disposed of according to private instructions to his executor, and dies without giving any instructions; 4 Ves. J. 117, *Mordaunt v. Hussey*. Or if the residue, or various particulars which in fact comprise the whole personal estate is given to the executor *for life*; 4 Ves. J. 725, *Dicks v. Lambert*. Or if the testator declares his intention of disposing of *part only* of his personal estate, with which design the whole tenor of the will is in correspondence: 7 Ves. J. 225, *Urquhart v. King*.} (b) But, if the ecclesiastical courts go about to oblige an executor to distribute the residue of a personal estate, a prohibition will be granted; for they have no jurisdiction to compel a distribution among the next of kin, but where the party dies intestate; 5 Mod. 247, *Petit and Smith*; *Caverly v. Caverly*, Mosely 49; 2 Ves. 29. The reason why they cannot compel a distribution is, because they cannot enforce the execution of a trust. 1 P. Wms. 549.

And this, it is said, was first done in the case of *Foster and Munt*, where the testator devised particular legacies to his children and grandchildren, and 10*l.* a piece to A and B, whom he made executors, for their care and pains; and the surplus of the personal estate, being 5000*l.* and upwards, the question was, Whether it should be a trust for the children, or go to the executors; and it was decreed a trust for the children.

Vern. 473; *Foster v. Munt*, Reg. Lib. 1687, A. fol. 25; *Rachfield v. Careless*, 2 P. Wms. 158; 9 Mod. 9, S. C. & S. P.; *May v. Lewin*, 2 P. Wms. 159, n. (1), S. P. || Tradition has erred extremely in its account of this case of *Foster v. Munt*. It has said, that the decree proceeded on the ground of fraud; whereas it went solely on the implied trust from the words of the will. See the words of the decree in the note on the case in Mr. Rathby's edition of *Vernon's Reports*. It has said it was reversed by the Lords Commissioners of the Great Seal, but afterwards affirmed in the House of Lords, but there is no trace of it on the Journals of that House. It has said, that it was the first case upon this point; but earlier cases have been found express upon it. ||

Since this there have been several cases, where from the intention of the testator, in making strangers executors, and giving them legacies, they have been decreed trustees for the next of kin, and compelled to make distribution accordingly.

For which vide 2 Vern. 148, 361, 648, 676. {The legacy excluding them must be of *personal* property, which, if not bequeathed, would go into the surplus. 1 Wash. 67, *Shelton v. Shelton*.} [It is now a settled rule in equity, that if a *sole* executor has a legacy *generally* and *absolutely* given to him, be it by the will or a codicil, he shall be excluded from the residue; *Joslin v. Brewett*, Bunb. 112; *Davers v. Dewes*, 3 P. Wms. 40; *Farrington v. Knightly*, 1 P. Wms. 544; *Vachel v. Jefferies*, Pr. Ch. 170; *Petit v. Smith*, 1 P. Wms. 7, and this, though the legacy be specific; *Randall v. Bookey*, 2 Vern. 425; *Southcot v. Watson*, 3 Atk. 226; *Martin v. Rebow*, 1 Br. Ch. Rep. 154; *Holford v. Wood*, 4 Ves. 70, or legacies be given to the next of kin; *Bayley v. Powell*, 2 Vern. 361; *Wheeler v. Sheers*, Mosel. 288; *Andrew v. Clark*, 2 Ves. 162; *Kennedy v. Stainsby*, stated in a note, 1 Ves. jun. 66; *Griffiths v. Hamilton*, 12 Ves. 310; *Langham v. Sanford*, 17 Ves. 451; for the rule is founded rather on a presumption of intent to exclude the executor, than to create a trust for the next of kin; and therefore, if there be no next of kin, a trust shall result for the crown. *Middleton v. Spicer*, 1 Br. Ch. Rep. 201. The above rule is founded upon the objection, that you shall not intend, that a person having a part given to him, is to take the whole. This is the settled law, and it would be vain and improper now to question the propriety of it: but

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the principle upon which this doctrine has been introduced, that an executor having a legacy is a trustee, has given so little satisfaction, that case upon case has occurred, piling down the application of it, until it is not easy to say upon what foundation it stands. *Per* Lord Eldon, in *King v. Denison*, 1 Ves. & Beam. 277-8. If therefore there be two or more executors, a legacy to one shall not exclude them from the surplus, for the testator might intend a preference to him *pro tanto*. *Colesworth v. Brangwin*, Pr. Ch. 313; *Johnson v. Twist*, cited 2 Ves. 166; *Buffar v. Bradford*, 2 Atk. 220; *Hawkins v. Mason*, Mosel. 20; 4 Br. P. C. 1, S. C.; *Wilson v. Ivat*, 2 Ves. 166; *Griffiths v. Hamilton*, 12 Ves. 298; *Pratt v. Sladden*, 14 Ves. 202. So, where there are unequal legacies, whether pecuniary or specific, to several executors, they shall not be excluded. *Brasbridge v. Woodroffe*, 2 Atk. 68; *Bowker v. Hunter*, 1 Br. Ch. Rep. 328; *Blinkhorn v. Feast*, 2 Ves. 27. *Secus*, where equal pecuniary legacies are given them. *Petit v. Smith*, 1 P. Wms. 7; *Carey v. Goodinge*, 3 Br. Ch. Rep. 110; *Southouse v. Bates*, 2 Ves. & Bea. 396. But see *Heron v. Newton*, 9 Mod. 11.] ||But, whether *distinct specific legacies* of equal value will have this effect, *qu.*; though the language of Lord Hardwicke in *Southcot v. Watson*, 3 Atk. 226, treats specific and pecuniary legacies as standing precisely on the same ground in questions of this nature; no case however to this purpose occurs in the books. See Mr. Cox's note in the case of *Farringdon v. Knightly*, 1 P. Wms. 550. See also *Nisbett v. Murray*, 5 Ves. 149. The cases of *Shrimpton v. Stanhope*, cited in 3 Atk. 230, and of *Willis v. Brady*, *Barnardist. Ch. Rep.* 64, are not cases of distinct specific legacies, but of specific legacies bequeathed, jointly to husband and wife, and therefore do not bear upon this point, being similar to the case of a specific legacy to a sole executor. If a legacy be given to one executor *expressly for care and trouble*, and no legacy to the other; they are both barred of the residue; for the one being clearly a trustee, the other must be so likewise; *White v. Evans*, 4 Ves. 21; *Sadler v. Turner*, 8 Ves. 617; *Milnes v. Slater*, *Ibid.* 295; both taking jointly, they must be both trustees, or both take the residue beneficially between them. 12 Ves. 308, by Lord Eldon. But there is no rule of law which prevents the testator from dividing the executorship, and giving the one the office, the other the benefit; for the circumstance, that one has a legacy for his trouble, is no more than a presumption against the other. So thought the master of the rolls, and therefore admitted parol evidence on behalf of the co-executrix, to rebut that presumption, and upon the evidence held her entitled to the residue undisposed of. *Williams v. Jones*, 10 Ves. 77. In this case the learned judge is reported to have laid great stress upon the infancy of the co-executrix, and to have considered it as almost sufficient of itself, without any evidence, to justify the conclusion that the testator intended her to take beneficially, and not to be a mere trustee. Perhaps, this was going too far; for a testator may, if he thinks fit, appoint an infant a trustee, and the argument from the singularity of such an appointment, from the improbability of his intending it, is answered by the fact, that he has actually done so. *King v. Denison*, 1 Ves. & Beam. 275. In *Blinkhorn v. Feast*, 2 Ves. 27, Lord Hardwicke treated it as a circumstance strengthening other evidence; but not to be relied upon alone. ||

As, where A devised lands to be sold for payment of his debts, *and willed, that the surplus should be deemed part of his personal estate, and go to his executor*; and gave to his executors 100*l.* apiece as a legacy; the question was, Whether the executors should have the surplus to their own use, or should distribute according to the statute of distributions? For the executors it was insisted, that the surplus should be part of his personal estate, and go to them; and that he meant it them to their own use; and his giving them a legacy of 100*l.* apiece cannot alter the case; for the surplus perhaps might be nothing, and therefore he gave them the 100*l.* that they might at all events be sure of something, and not to exclude them from the benefit of the surplus; and this being a devise of the surplus, after debts and legacies paid, cannot be a trust in them; for then all their trust is performed when debts and legacies are paid. On the other side it was said, that the words in the will, that *the surplus should be part of his personal estate, and go to his executors*, were only intended to exclude the heir, who else would have it; and not to give any greater interest to his executors than they would have had otherwise. And of this opinion was my.

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Lord Chancellor, and decreed accordingly; which decree was affirmed in parliament.

Abr. Eq. 244, 245; Hil. 1697, Lord Bristol v. Hungerford; Pr. Ch. 81, S. C.; 2 Vern. 645, S. C.; 3 P. Wms. in note [c.] S. C. cited. || Vernon erroneously states it to be a trust for the heir at law. Peere Williams notices this, and gives the decree from the Register's book. 10 Ves. 76, S. C. cited by M. R. ||

But, as this construction has been made purely on the intention of the testator, so such intention must appear exceeding plain; otherwise the rule of law is to take place; as, where a man devised his library of books to A, (except ten books, such as his wife should choose; as plays, romances, sermons, but not law books,) and made her executrix: it was holden that she should not by this devise be excluded from the benefit of the surplus of the personal estate.

Abr. Eq. 245; Trin. 1704, Griffith and Rogers; Pr. Ch. 231, S. C. [Newstead v. Johnstone, 2 Atk. 45; Southcot v. Watson, 3 Atk. 229.] {In Bowker v. Hunter, 1 Bro. C. C. 330, Lord Thurlow lays down the rule, that the executor shall take the residue unless there is an *irresistible inference* to the contrary. *A strong and violent presumption* are the words used by Lord Alvanley. 2 Ves. J. 471, Clennel v. Lewthwaite; 4 Ves. J. 729, Dicks v. Lambert. But the true rule is that stated by Sir William Grant in Urquhart v. King, 7 Ves. J. 228; that it is always a question of intention whether the executor is entitled beneficially or as a trustee; and this question depends upon the sufficiency of the evidence by which the intention is made out. 1 Bin. 575, Grasser v. Eckhart; Vide 4 Ves. J. 644, De Mazar v. Pybus; 10 Ves. J. 71, Seley v. Wood.}

So, where A was executrix to B her former husband, and after married C, who by his will in 1686 devised to his wife the plate and goods she brought him in marriage, and two silver salvers in lieu of plate that had been exchanged away, and made her executrix, and died leaving a daughter by a former wife, and his wife *enseint* of a daughter; and there being no devise of the surplus of the personal estate, the question was, Whether she should take it as executrix to her own use, or liable to distribution; and my Lord Keeper decreed the surplus to the wife, as well for that this will was made before the case of Foster and Munt, as also for that in this case nothing is devised to the wife but what was her own before, and as she was executrix to her former husband; but principally because, where a wife is made executrix, it is to be presumed she was not made so to have barely an office of trouble, but of benefit to take the surplus.

2 Vern. 675; Hil. 1711, Ball v. Smith. [This case hath been overruled, and it is now settled, that a wife, appointed executrix, is, as to the residue, precisely in the situation of any other executor; Lake v. Lake, Ambl. 126; Godsall v. Sounden, 2 Eq. Cas. Abr. 444, pl. 58; Martin v. Rebow, 1 Br. Ch. Rep. 154; unless the legacy to her, being specific, consist of property, which was her's before marriage; for this may vary the rule. Lawson v. Lawson, 7 Br. P. C. 511.]

So, where A, possessed of a long term for years, by will devised it to his wife for life, and after her death to the child she was then *enseint* with; and if such child died before it came to twenty-one, then he devised one-third part of the said term to his wife, her executors and administrators; and the other two-thirds to other persons, and made his wife executrix of his will, and died; and a bill was brought against her by the next of kin to the testator, to have an account and distribution of the surplus of his personal estate, not devised by the will: two questions were made; 1st, Whether the devise to the wife of one-third part of the term was good, because it happened she was not then *enseint* at all, and so the contingency upon which the devise to her was to take place never happened? the other question was, Whether this term, being part of the personal estate and ex-

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pressly devised to her for life, with such other contingent interest on the death of the supposed *enseint* child before twenty-one, should shut her out from the surplus of the personal estate, which belonged to her as executrix; and so the surplus go in a course of administration to be distributed among the next of kin? As to the first point, my Lord Keeper delivered his opinion, that though the wife was not *enseint* at the time of the will, yet the devise to her of such third part of the terna was good; and as to the other point, (a) dismissed the plaintiff's bill, and so let in the executrix to the surplus of the personal estate, notwithstanding the devise to her of part as aforesaid.

Abr. Eq. 245; Mich. 1711, Jones v. Westcomb; 1 Pr. Ch. 316, S. C.: Gilb. Eq. Rep. 74, S. C. (a) [*See acc.* Lady Granville v. Duchess of Rutland, 1 P. Wms. 114; Nourse v. Finch, 1 Ves. jun. 356; Hoskins v. Hoskins, Pr. Ch. 263.]

So, the testator, being possessed of a personal estate to the value of about 2000*l.*, and being taken ill, makes his will in writing the very day before his death; and thereby devises several legacies to his relations: and amongst the rest he gives the plaintiff, his sister, about 1000*l.* and gives 70*l.* to Mr. Searle and his wife, and their four children, to buy them mourning; and gives to his dear and most esteemed friend Mrs. Sarah Searle (one of the daughters of Mr. Searle, to whom he had made his addresses in way of marriage) 500*l.*, and gives his horse and furniture to one of the defendants by his Christian name and surname; and his clothes to be disposed of by his executors; and then concludes, *as to the 700*l.* I am entitled to in the South-Sea Company, and the rest of my personal estate, I will that the same shall be sold for the payment of my debts and legacies; and I make Mr. John and Mr. Thomas Searle my executors*, and dies. The executors were two of the children of Mr. Searle, and entitled to their proportion of the 70*l.* devised for mourning; and one of them to the horse and furniture; but were no ways related to the testator. The surplus of the personal estate came to about 600*l.*, and the bill was brought against the executors to have an account thereof, and that it might be paid to the plaintiff, whose wife was the only sister and next of kin to the testator. For the plaintiff it was insisted, that the executors were mere strangers, no ways related to the testator; and that they had particular legacies left them for mourning out of the 70*l.*, and one of them had a horse and furniture expressly devised to him, and therefore it was not reasonable that they should go away with the surplus of the personal estate. On the other side it was insisted, that the defendants being executors, they represented the testator, that they stood in his place, and were entitled to whatever he left undisposed of; that this was the ancient law for many ages, and therefore the legal title being in them, they ought not to be defeated of it without a manifest intention of the testator to the contrary; that there appeared no such intent in the will, for they are not named either by the Christian name or surname, or so much as by the name of their office till the very close of the will; nay, it was in proof, that the testator did not so much as consider whom he should make his executors till he had disposed of all the legacies; that the giving one of them his horse and furniture was only to exclude the other, who, by being executor with him, would have been equally entitled to it, and could not be counted a legacy to shut them out of the surplus, since it rather regarded the other executor than the plaintiff the next of kin; and they had it fully in proof, that the testator being asked, Whether he would not give his sister more? answered, he would not; that being asked, Who should have the surplus?

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he said his will should stand as it was, and that he had a very great regard for the defendant's family, and was to have married their sister; and that these proofs being in affirmance of the disposition the law made for the executors, might be read; and that several resolutions since the case of Foster and Munt had pared away the authority of that case, and therefore prayed that the bill may be dismissed. My Lord Chancellor was clearly of opinion, that the proofs being in affirmance of the disposition ought to be read: and said, that they were so full as to make an end of this case; that without a strong and violent implication,<sup>(a)</sup> the executors ought not to be defeated of the *residuum*; that here was no such implication in this will, but rather the contrary; that to make sense of the last clause, it must be construed a devise of the South-Sea stock, and the rest of the personal estate to his executors; for it is immediately followed by "*and I make John and Thomas Searle my executors*;" which could have no relation to the direction for sale, unless by giving them the surplus which should arise by sale; and as there appeared no strong or violent implication to induce any other construction, he could not give in to so great a change of the law, but must decree for the executors; and accordingly did so.

Hil. 1716, Batchelor and Searle, Gilb. Eq. Rep. 125; Eq. Ca. Abr. 246, S. C. *in totidem verbis*; 2 Vern. 736, S. C., but not so well reported. || (a) In Bowker v. Hunter, 1 Br. Ch. Rep. 330, Lord Thurlow is made to say, it must be an irresistible inference; but this was going too far; it is enough if there be a strong and violent presumption. If there must be an irresistible inference, parol evidence could not be admitted. By Arden, M. R. 2 Ves. jun. 471; 4 Ves. 90. To the same effect by Grant, M. R. 14 Ves. 197.||

And as this doctrine of making the executor a trustee for the next of kin subsists only by the notions of a court of equity, which by implication, and contrary to the rules of law, gives the *residuum* to the next of kin; so the executors have been admitted by parol on evidence to show, that the testator intended the *residuum* for them, which has been thought reasonable, being only to rebut an equity, and oust an application arising from the rule of equity.

Vide 2 Vern. 252; the case of the Countess and Earl of Gainsborough, Abr. 230, S. C.; and 2 Vern. 648. [Lady Granville v. Duchess of Beaufort, 1 P. Wms. 114, S. C.; Petit v. Smith, 1 P. Wms. 7; 5 Mod. 247, S. C.; Com. Rep. 3, S. C.; Batchelor v. Searle, 2 Vern. 736; Duke of Rutland v. Duchess of Rutland, 2 P. Wms. 210; Mallabar v. Mallabar, Ca. temp. Talb. 78; Lake v. Lake, 1 Wils. 313; Ambl. 126; Brown v. Selwin, Ca. temp. Talb. 240. But parol evidence, it is said, ought in this case to be admitted with great caution. Rachfield v. Careless, 2 P. Wms. 160; Duke of Rutland v. Dutcheess of Rutland, Ibid. 215; Blinkhorn v. Feast, 2 Ves. 28; Nourse v. Finch, 1 Ves. jun. 358, and restricted to what passed at the time of making the will. See the two last cited cases.] || But Lord Chancellor Eldon has declared the sum and sense of all the authorities to be, that all parol declarations, whether made *before*, or *at*, or *after* the making of the will, are admissible to rebut presumptions, though they are not all alike weighty and efficacious. Whether they consist of conversations with people who have nothing to do with the question, of declarations provoked by impertinent inquiries, or in whatsoever form they arise, they are *all* evidence, though entitled to very different credit, according to time and circumstances. In the degrees of such evidence, contemporary declarations are clearly of the greatest weight; next to such contemporary declarations, those which are made *after* the making of the will are the most efficacious; for a declaration *after* the will, as to what the testator had done, is entitled to more credit than one *before* the will as to what he *intended* to do, for that intention may very well be altered; but he knows what he *has* done, and is much more likely to speak correctly as to that, than as to what he *proposes* to do. Trimmer v. Bayne, 7 Ves. 517.||

As, where one not of kin, but a stranger, was made executor, and had considerable legacies given him; although it was decreed by Sir Peter

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King, in the mayor's court, in favour of the testator's two brothers, that the surplus should be distributed; yet, upon an appeal to the House of Peers, that decree was reversed, not barely as it stood upon the will, but that parol proof ought to be received in favour of the executor's title, consistent with the will; and the proof being full, as to the testator's frequent declarations, that his executor, though a stranger, should have the surplus, it was decreed accordingly.

Abr. Eq. 245, *Littlebury v. Buckley*; 2 Ves. 95, S. C. cited.

So, in the case of *Hatton and Hatton*, where the wife was made executrix, and a considerable legacy devised to her; yet the proof being strong, that the testator intended the surplus to her own use, the same was decreed accordingly, both at the Rolls and in Chancery.

Hil. 6 G. 2; *Hatton v. Hatton*, 2 Str. 865, S. C.; *Fitzgib.* 126, S. C.; 1 *Barnardist.* 277, 329, S. C.

But, where A, being possessed of a considerable personal estate, made his will, and thereby devised several legacies, but gave none to his executor; and the question was, Whether parol evidence ought to be admitted, to prove that the testator did not intend that the executor should have the residue of his personal estate, but that the same should go according to the statute of distributions? it was holden clearly, that no such evidence could be admitted, for that this would be to admit evidence not to oust an implication, but to contradict the rule of law, and what appeared on the face of the will.

Hil. 6 G. 2; *Lady Osborne v. Villiers*.

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It hath been already observed, that before the statute 22 & 23 Car. 2, c. 10, the ecclesiastical courts had no jurisdiction to compel distribution of intestates' estates: for though by the 31 E. 3, st. 1, c. 11, and 21 H. 8, c. 5, they had authority to grant administration to the widow or next of kin; yet, having once granted it, they had executed their authority; and the administrator, coming in the place of the executor, had the whole personal estate of the intestate, after debts.

And. 410, 414; Cro. Car. 62, 201; Jon. 228; Style, 456; Hob. 83, 191; Lev. 233; Carter, 125.

Yet after it had been solemnly adjudged in the common law courts, that the ecclesiastical courts could not compel a distribution, it seems that when they were under deliberation, whether they would grant administration to the wife or next of kin, and to which of the next of kin, they used to treat with the parties, and consider what sum the overplus was like to amount to; and how that ought, by their rules, to be distributed; and they would prefer him to the administration, that would beforehand perform such distribution by payment of money, and by giving securities to persons to whom it was appointed.

Raym. 499.

||An administrator is not bound by the condition of the bond given in pursuance of the statute of distributions, to distribute the surplus of the intestate's estate after payment of debts, &c., until a decree, directing him to



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do so, has been made by the court into which his inventory and account have been exhibited.

Archbishop of Canterbury v. Tappen, 8 Barn. & C. 151.||

But because it was found very inconvenient for any administrator to pay before he received, for it was hard for him to know what he might undertake before he had possession, and the judge could not have a perfect knowledge of the true value of the overplus, to guide him in the measure of his distribution till after the administration ended, and the account of the estate taken; (a) to remedy these inconveniences, and to compel a just and equal distribution of the estates of intestates,

By the 22 & 23 Car. 2, c. 10, § 3, it is enacted, "That the ordinaries and judges respectively shall and may, and are enabled to proceed and call such administrators to account for and touching the goods of any person dying intestate, and, upon hearing and due consideration thereof, to order and make equal and just distribution of what remaineth clear (after all debts, funerals, and just expenses of every sort, first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person, in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and to settle, and to compel such administrators to observe and pay the same, by the due course of his majesty's ecclesiastical laws. Saving to every one, supposing himself or themselves aggrieved, their right of appeal as was always in such cases used."

Raym. 499. (a) My Lord North observes, that though public inconveniences were urged to the parliament by the civilians, yet they had another reason to desire that those methods might be changed; for the allotting of distributions in this manner was but a barren jurisdiction that could not be drawn out in length; all disputes were ended *uno flatu* without appeal, and the accounts of administrators were never contested, when there was no adversary concerned to demand a share in the overplus upon taking them. Raym. 499.

§ 5. "Provided always, That all ordinaries, and every other person, who by this act is enabled to make distribution of the surplus of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates, in manner and form following: that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share, which shall by such distribution be allotted to the other children, to whom such distribution is to be made: and in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime, by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate, of all the said children to be equal, as near as can be estimated; but the heir at law, notwithstanding any land that he shall have by descent, or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any con-

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sideration of the value of the land which he hath by descent, or otherwise, from the intestate."

§ 6. "And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the said intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them."

§ 7. "Provided that there be no representations admitted among collaterals after brothers' and sisters' children; and in case there be no wife, then all the said estate to be distributed equally to and amongst the children; and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever."

§ 8. "Provided also, To the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death; and that such and every one, to whom any distribution or share shall be allotted, shall give bond with sufficient sureties in the said courts, that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear, that then and in every such case, he or she shall respectively refund and pay back to the administrator his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator, by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid."

§ 9. "Provided always, That in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do, and the will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been if this act had never been made."

By § 4, it is provided also, "That nothing in this act shall extend to or prejudice the customs of London or York, or other places having known and received customs peculiar to them, but that the same customs may be observed as formerly."

In the construction of this statute it being doubted, whether the husband was entitled to administration to his wife, as before, so as not to be obliged to distribute the personal estate amongst the rest of kin to the wife; by the 29 Car. 2, c. 3, § 25, it is declared, "That neither this act nor any thing therein contained, shall be construed to extend to the estates of feme coverts, who shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act."

2 Mod. 20.

Also, to (a) explain and ascertain what share the mother was entitled to upon the death of a child, where the father was dead, by the 1 Jac. 2, c. 17, it is enacted, "That if after the death of the father any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her."

(a) The reason of making the act was, because the mother might marry, and carry

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all away to another husband; but the father surviving is entitled to the whole personal estate. Salk. 251; 1 P. Wms. 48, 49; Lord Raym. 684; Com. Rep. 96.

|| Also, doubts having arisen upon the clause respecting the customs of London and York, it is enacted and declared by the st. 1 Ja. 2. c. 17, § 8, that that clause "was never intended nor shall be taken or construed to extend to such part of any intestate's effects, as any administrator by virtue only of being administrator, by pretence or reason of any custom may claim to have, to exempt the same from distribution, but that such part in the hands of such administrator shall be subject to distribution as in other cases within the said act.||

In the construction of the above statute for distributing intestates' estates, the following opinions have been holden:

1. That the clause which says, that there shall be no representations among collaterals beyond brothers and sisters' children, must be intended brothers and sisters of the intestate, and not to admit representation when the distribution happens to fall out amongst brothers and sisters, though remote relations to the intestate; for the intestate is the subject of the act; it is his estate, his wife, his children, and by the same reason his brother's children, for he is equally the correlative to all.

Raym. 496; Carter v. Crawley, a good argument of Lord Chief Justice North's on this head. [Caldicot v. Smith, 2 Show. 286; Beeton v. Darking, 2 Vern. 168; Pett v. Pett, Salk. 250; Ld. Raym. 571, S. C.; Com. Rep. 87, S. C.; 1 P. Wms. 25, S. C.; Bowers v. Littlewood, Ibid. 595.]

2. On that clause of the statute, which directs the distribution to every of the next of kindred of the intestate, who are in equal degree, it hath been adjudged in several books, that a brother or sister of the half-blood shall come in for a share with one of the whole blood, being as near a kin to the intestate. [And (a) this shall extend to a posthumous brother of the half-blood.]

Smith v. Tracey, Mod. 209; 2 Mod. 204, S. C.; 2 Jon. 93, S. C.; Vent. 316, S. C.; 2 Lev. 173, S. C.; 2 Vent. 317; Show. Parl. Cases, 108; Vern. 437; 2 Vern. 124; Carth. 51, S. P. adjudged; Show. 1, 2, S. P.; Comb. 112; Clift. 243; Holt, 258, pl. 2. (a) [Burnet v. Man, 1 Ves. 156.]

3. That where the statute says, that distribution shall be amongst representatives of persons deceased *pro suo cuique jure*; by this it is meant, that distribution shall be *per stirpes* and not *per capita*; so that if the father has two sons, and one of them dies in his lifetime, leaving three children, and the father dies intestate, the surviving son shall have half the personal estate, and the other moiety shall be equally divided amongst the children of the dead son: yet, it hath been holden, that if A has three brothers, and one dies leaving three children, another two, and the third five, and A dies intestate, that in this case the distribution shall be *per capita*, and not *per stirpes*, and that all the children shall have an equal share; for the brothers being all dead, none take by way of representation, but all as next of kin.

Walsh v. Walsh, Eq. Cas. Abr. 249, pl. 7; Prec. Ch. 54, pl. 53; Bowers v. Littlewood, 1 P. Wms. 595; Davers v. Dewes, 3 P. Wms. 50; Lloyd v. Tench, 2 Ves. 213; Durant v. Prestwood, 1 Atk. 454; Stanley v. Stantley, Ibid. 455; Janson v. Bury, Bunb. 159.

4. On the clause of the statute, which directs that no distribution shall be within a year after the death of the intestate, it hath been adjudged, that, if a person entitled to a distributive share dies within the year, yet it is such an interest vested in him as shall go to his executor or administrator; for the statute doth not make any suspension or condition precedent to the

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interest of the parties, but is a clause merely for the benefit of creditors. Also, this statute, being in nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden, that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue, &c., which remains over, and not the executor of the first testator.

Carth. 51; Comb. 14, 112; 2 Show. 285, 407; Show. 2, 25, 26; Skin. 212, 218; 3 Mod. 58; 1 Vern. 403.

5. It hath been holden, that, if the father dies intestate, leaving one child, this is not *casus omissus*; and, consequently, if there be a wife, that she shall have but a third part; and that, if the child die intestate, administration is to be granted to the next of kin to him, and not to the next of kin to the father.

Carth. 52, and vide 3 Mod. 59; Skin. 212, 219, S. P., but no resolution.

6. It hath been resolved, that if one dies intestate, leaving a grandmother and uncles and aunts, the grandmother is entitled to the personal estate, in exclusion of the uncles and aunts.

Woodroffe v. Winkworth, Pr. Ch. 527; Eq. Ca. Abr. 249, S. C.; Blackborough v. Davies, 1 P. Wms. 41; 1 Salk. 251, S. C.; 1 Ld. Raym. 684, S. C.; Com. Rep. 96, S. C.

[7. It hath been resolved, that if a person dying intestate leave a grandfather by the father's side, and a grandmother by the mother's side, his next of kin; these (grandfather and grandmother) shall take in equal moieties by the statute of distributions, as being in equal degree: for though the grandfather on the father's side may, in some respects, be more worthy of blood, yet here dignity of blood is not material, in regard the brother of the half-blood shall take equally with the brother of the whole blood.

Moor v. Barham, 1 P. Wms. 53.

8. It hath been resolved, that if a person dying intestate leave a grandfather and a brother, the grandfather shall not share the personal estate with the brother, but the latter shall take the whole: for the brother is nearer than the grandfather, there being by our law but one degree between brother and brother, whereas there are two degrees between grandfather and grandson.

Evelyn v. Evelyn, 4 Burn's E. L. 363; Ambl. 191, S. C.]

9. It hath been resolved, that if a man die intestate, leaving a widow and one son, and afterwards the son die intestate, then the mother is delivered of a child whereof she was enseint at her husband's death; such posthumous child is entitled to a share of the son's personal estate.

Wallis v. Hudson, in Chan. Hil. 14 Geo. 2; Barnard. 272, S. C.; 2 Atk. 115, S. C.; 2 P. Wms. 446, S. P.; Ball v. Smith, 2 Freem. 230, S. P. See Thellusson v. Woodford, 11 Ves. 139.

[It hath been resolved on the statute of Ja., that if a man die intestate and without issue, leaving a wife, and several brothers and sisters, and his mother living, the mother shall have no more than an equal share of a moiety of the estate with the brothers and sisters. And though there should be no brother or sister, yet if there are the children of a deceased brother or sister, they shall take the same share with the mother which their parent would be entitled to.

Keilway v. Keilway, 2 P. Wms. 344; 1 Str. 710; Gilb. Rep. 189; Stanley v. Stanley, 1 Atk. 455.

## (K) Of Advancement, and bringing into Hotchpot,

Where a person dies intestate, having personal property in different places, and subject to different laws, it is now settled, that the *lex domicilii*, not the *lex rei sitæ*, shall attach upon the property, and direct the succession to it. What shall be considered as the *domicil* of the party is rather a question of fact than of law.

Bruce v. Bruce, Dom. Proc. 15 April, 1790; Hog v. Lashley, Dom. Proc. 7 Mar. 1792; Balfour v. Scott, Dom. Proc. 11 Mar. 1793; Ommaney v. Douglas, Dom. Proc. 18 Mar. 1796; Bempde v. Johnstone, 3 Ves. jun. 200.

Upon this principle it was determined by the privy council in the case of Burn v. Cole, 7th April, 1762, that where a testator domiciled in England died, the judge of the probate in the plantations was bound by the probate granted in England. The *lex domicilii* regulates testate as well as intestate succession.

Ambl. 415.]

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By a custom, which has prevailed time out of mind in certain places, the wife and children of a person deceased are entitled to the writ *de rationabili parte bonorum*, on which writ they shall, according to the custom, recover their shares and proportions of the personal estate. But such children as were reasonably advanced by the father in his lifetime (*a*) with any part of his goods, shall have no farther share; for the words of the writ are, *nee in vitâ patris promoti fuerunt*. But yet such child being only in part advanced, may bring such advancement into *hotchpot*, or, as the civilians express it, into the *collatio bonorum*, and then such child will be entitled to an equal share with the rest.

Co. Litt. 176 b; Reg. 142. For the custom of London herein, vide tit. *Customs of London*, Mayn. 9. ||(*a*) A provision by will is therefore no advancement. 2 P. Wms. 440. To be such it must result from a complete act of the intestate in his lifetime, by which he divests himself of all property in the subject, though it need not take effect in possession till after his death. Ibid. || *β* An advancement is a gift, by anticipation, of the whole or a part of what it is supposed a child will be entitled to on the death of the party making the advancement. Osgood v. The Heirs of Breed, 17 Mass. 358. See Newman v. Wilbourne, 1 Hill, Ch. R. 10; Snelgrove v. Snelgrove, 4 Desaus. 274; Newell's case, Browne, 311; Beamis v. Stearns, 16 Mass. 200. But a debt due by the heir to the intestate is not considered as an advancement. 17 Mass. 359; Proctor v. Newhall, 17 Mass. 93.*g*

This advancement that will exclude a child must be by the father, and not by any other; (*b*) nor will any fortune, though never so great, acquired by the child by his labour and industry, exclude him.

Swinb. 217. ||(*b*) Not even by a mother, Holt v. Frederick, 2 P. Wms. 356.

Also, such advancement as will exclude a child, unless he brings it into hotchpot, must be given directly to the child, and not to another for the benefit or advantage of the child; and therefore money given to bind a child out an apprentice, or laid out in his education, either at school or at an university, or on his travels, is no advancement.

Swinb. 217; 2 P. Wms. 449. *β* When an advancement is made in money or goods, it must be charged against the personal estate to which the party advanced is entitled by the rules of descent and distribution. Beamis v. Stearns, 16 Mass. 200. See Earnest v. Earnest, 5 Rawle, 213. When a testator directed by his will that each child should be charged in the distribution with what he had given them, or should be charged in his book, it was held the charges might be shown to be false or excessive, Hoak v. Hoak, 5 Watts, 80; or that they had been paid to the testator. *Muselman's Estate*, 5 Watts, 9.*g*

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|| Nor is money laid out in maintenance of a child an advancement. But whether maintenance and support of a daughter after marriage would be considered as an advancement, *qu.*

*Elliot v. Collier*, 1 Ves. 15; 3 Atk. 529, S. C. In this case Lord Hardwicke ordered it to be charged as a debt due from the daughter to the father's personal estate. ||  $\beta$  The profits of the thing advanced are not considered as an advancement. The property must be accounted for at its value when given. *Williams v. Stone-street*, 3 Rand. 559; *Hudson v. Hudson*, 3 Rand. 117; *Beckwith v. Butler*, 1 Wash. 224; 17 Mass. 358; *Sinkler v. Sinkler*, 2 Desaus. 127; *Hall v. Davis*, 3 Pick. 450.*g*

.So, if the father purchases for his child an advowson, or any other ecclesiastical benefice; or if he buys him any office civil or military, (a) these are not such advancements as will exclude him from a distributive share.

*Swinb.* 217. || (a) *Vide contr.*, 3 P. Wms. 317, note (O), where it is considered as an advancement *pro tanto*, although the office be only at will, as a gentleman pensioner's place, or a commission in the army. So, an annuity is an advancement, the value of which may be calculated by the value at the date of the grant; or, if it has ceased, according to the payments received, at the option of the child. *Lord Kireudbright v. Lady Kireudbright*, 8 Ves. 55.||

On the statute 22 & 23 Car. 2, c. 10, which expressly excludes every child advanced by the father, except the heir at law, from a farther share, unless he brings such advancement into the *collatio bonorum*, it hath been holden, that if the heir at law hath a settlement or provision made on him on his father's marriage, out of the *personal estate*, (b) that upon the father's dying intestate, to entitle him to any more, he must bring such advancement into hotchpot.

2 Vern. 638, *Phiney v. Phiney*. || In this case the plaintiff's father, on the marriage of the daughter of B, covenanted, in case of a second marriage, to pay the first son by the first wife 500*l.*; there was a son and several other children of the first marriage: the father died intestate; and it was holden, that the heir must bring the 500*l.* into hotchpot, although in nature of a purchaser under a marriage settlement, he not being by the statute of distributions distinguished from the other children of the intestate. (b) Be it the use of furniture only for his life, the law is the same; for it is an advancement *pro tanto*. *Com. Dig. tit. Administration*, (H.) *Fitzg.* 285. So it seems, that co-heiresses shall bring in such advancement, not being land, as they may have respectively received from their father, before they shall be entitled to their several distributive shares, agreeably to the general purport of the act, which is evidently to promote an equality as much as may be. 4 *Burn's E. L.* 344.||

So, where the father, on his marriage, in consideration of a marriage-portion, covenanted to settle such an estate to the use of himself for life, remainder to his intended wife for life, remainder to the first and every other son of the marriage in tail male, remainder to trustee for 1000 years, in trust to raise portions for daughters in case there were no sons; that is to say, if but one such daughter, the sum of 5000*l.*, and if two or more, then the sum of 6000*l.* equally between them, payable at their respective ages of eighteen, or days of marriage, which should first happen, and 80*l.* maintenance in the mean time; the wife died, leaving but one daughter; the father married again and had several children, and died intestate, the daughter by the first marriage not being above the age of eighteen; it was holden, that in order to entitle her to share with the other children, she must bring this 5000*l.* into hotchpot.

*Abr. Eq.* 249, &c.; *Freeman v. Edwards*, 2 P. Wms. 435, S. C.

If a father dies intestate, as to part of his personal estate, a child advanced by him in his lifetime is not to bring such advancement into

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hotchpot, in order to have a distributive share of such part, whereof he died intestate.

Vachell v. Jeffreys, Pr. Ch. 170; *β* 4 Desaus. 274; 1 Hill's Ch. R. 10.*g*

|| The provision in the statute applies only to the case of actual intestacy; and where there is an executor, and consequently, a complete will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them. Therefore a child advanced in his father's lifetime cannot in such case be called on to bring his advancement into hotchpot.

Watson v. Watson, 14 Ves. 324; *per* Master of the Rolls, Cowper v. Scott, 3 P. Wms. 119; Wheeler v. Sheer, Mos. 303. *β* A father devised all his property to his children by will, and afterwards acquired real estate, and had a posthumous child; the devisees were required to bring the devised land into hotchpot, in order to entitle themselves to a share of such estate. Vance v. Haling, 2 Yerg. 135. In cases of partial intestacy, a child advanced is not bound to bring into hotchpot. 1 Hill, Ch. R. 10; 4 Desaus. 274.*g*

If money be laid out by the intestate on the repairs of houses, which descend to his eldest son as heir, it is no advancement. *Secus*, if on houses given to the son by the intestate in his lifetime.

Smith v. Smith, 5 Ves. 721.

Although the exception in the statute mentions only the heir at law, and in common parlance the heir at law is the eldest son, in relation to the intestate, and is only one person; yet shall not the customary heir, the youngest son, be compelled to bring into hotchpot the lands which have descended upon him: no law obliges him to do so, and the statute does not require it; for it speaks merely of such estate as a child hath by settlement, or by advancement of the intestate in his lifetime.

Lutwyche v. Lutwyche, Ca. temp. Talb. 276; Pratt v. Pratt, decreed at the Rolls *contr.* 2 Str. 936, reversed by Lord Talbot, Fitzg. 284.]]

[If a child, who hath received any advancement from his father, die in his father's lifetime, leaving children, those children shall not be admitted to their father's distributive share without bringing their father's advancement into hotchpot. And the reason is, because they do not take in their own right, but as representing their father.

Proud v. Turner, 2 P. Wms. 560. || But grandchildren are not entitled, within the custom of London, to a share of the orphanage part. Fowke v. Hunt, 1 Vern. 397; Northey v. Burbage, Pr. Ch. 470; Gilb. Eq. Rep. 136, S. C.; 1 P. Wms. 341, S. C.; Anon. 2 Salk. 426; 2 Show. 467.]]

A child, partly advanced, shall bring in its advancement only among the other children; for the wife shall have no advantage of it.

Ward v. Lant, Pr. Ch. 182-4; Garon v. Trippet, Amb. 189.] *β* Porter v. Collins, 7 Conn. 1; Lawton's case, 3 Desaus. 199; Stearns v. Stearns, 1 Pick. 157. But in North Carolina, by statutory provision, advancements are to be brought into a distribution for the benefit of the widow. Davis v. Duke, 1 Taylor, 213; C. & N. 361.*g*

*β* What are advancements to a child depends mostly on the circumstances of the gift.*(a)* This depends upon the intention of the father. If, for example, a child give the father a receipt for articles delivered to him, promising to return them, if requested, and the father write thereon that they are not to be exacted, but are to be considered as a part of the child's portion, this will be considered as an advancement.*(b)* Or when the father takes a conveyance in the name of a child, unprovided for, it is held to be an advancement.*(c)* But where it expressly appears that it should not be an advancement, it will be a resulting trust

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to the father.(d) In a case where a father paid for land, and took a bond for a title to himself and his son jointly, it was held to be an equitable advancement to the son of a moiety.(e)

(a) McGaw v. Blewit, 2 McCord's Ch. R. 103. (b) Bulkeley v. Noble, 2 Pick. 337; (c) Sampson v. Sampson, 4 S. & R. 333; Parish v. Rhodes, Wright, 339; Jackson v. Matsdorf, 11 Johns. 91; (d) 11 Johns. 91. (e) Thompson v. Thompson, 1 Yerg. 97.g

(L) What shall be a *Devastavit*, either in Executors or Administrators: And herein, of the Order of paying Debts and Legacies.

### 1. What Manner of Wasting will amount to a *Devastavit*.

A DEVASTAVIT is a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the trust and confidence reposed in them, for which executors and administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased.

Off. of Exec. 156; Godolph. 203. βGuardians, executors, administrators, and other trustees, and all other persons acting in a fiduciary capacity, are bound and liable for the solvency of securities which they take for money due to their wards, or their testator's or intestate's estates, or their *cestui que trust*, as the case may be, or for negligence in collecting money, when the party is likely to become insolvent. A person acting in a fiduciary capacity is required to use the same care and management that a prudent man would exercise in his own affairs. Glover v. Glover, 1 McMullan, 153.g

Executors may be guilty of a *devastavit*, not only by a direct abuse by them, as by spending or consuming the effects of the deceased, but also by such acts of negligence and wrong administration as will disappoint creditors of their debts.

Off. of Exec. 157; βAlden v. Park, 5 Dowl. P. C. 16.g

Therefore it hath been holden, that if the executor sells the testator's goods at an undervalue, especially if he might have gotten more for them; or if this were done by him for his own advantage, and to defraud creditors, it is a *devastavit*, and he shall answer the real value.

Off. of Exec. 157; Kelw. 59, 62, &c.; 3 Leon. 143.

So, if an executor omits to sell the goods at a good price, and after they are taken from him, there the value of the goods shall be assets in his hands, and not what he recovers, for there was a default in him.

6 Mod. 181, per Holt, C. J.

But if, without any omission of his, goods are taken out of his possession, and he does not recover so much in damages as the goods were really worth, and that happens not through any default of his, he shall answer for no more than he recovers. So, if the goods are perishable goods, and before any default in him to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself. But, if one takes goods out of his possession, he must sue him that took them, to have an opportunity of discharging himself of answering more in assets than he recovers.

6 Mod. 181, per Holt, C. J.

If the executor releases debts due to the testator, this shall charge him to the (a) value of the debt, though perhaps he did not receive near so much as was due. So, if he releases a cause of action, accruing either in the lifetime of the testator, or in his own time, in right of the testator, this will be a *devastavit*.

Off. of Exec. 158; Hob. 66; And. 138; Cro. Eliz. 43; 4 Leon. 102; Godb. 29



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{a) If an executor should release a debt of 100*l.* for one shilling, that will not bind a creditor; but in case there is no other creditor, save only the executor himself, there his assent will be binding on him; as if an executor will voluntarily release a debt, he shall not be relieved against it, though a creditor should. Vern. 455, *per* Lord Chancellor.

Also it is said, that if an executor pays money in discharge of an usurious bond, entered into by his testator, that this is a *devastavit*.

Hob. 167; Brownl. 33; Noy, 129, S. P. || So, of a bond *ex turpe causâ*. 1 Ves. 254. And such payment will be a *devastavit* as well against legatees as against creditors.||

It is holden, that if an executor to an obligee in a penal bond, after the bond is forfeited, releases the penalty on receipt of principal and interest, this is a *devastavit*. But the contrary hereof is holden by three judges in (a) Cro. Car., for that the executor in this case does no more than what in equity and conscience he ought to do. But, if an infant executor gives such a release, it is void; but this it seems arises from the privilege of infancy.

Off. of Exec. 158. (a) Cro. Ca. 490; Kniveton v. Latham, W. Jones, 400; [Ca. temp. Hardw. 226; and see 4 Ann. c. 16, § 13.]

If an executor takes an obligation in his own name, for a debt due by simple contract to the testator, this shall charge him as much as if he had received the money; for the new security hath extinguished the old right, and is *quasi* a payment to him.

Off. of Exec. 158; Yelv. 10. || *Qu.* But where an executor delivered up a bond due to his testator, and took a new bond with surety to himself for the debt; this, though a conversion at law, was holden to be none in equity. Armitage v. Metcalf, 1 Ch. Ca. 74; Max. Eq. 27. So if an executor, for the benefit of the testator's estate, invest it in the funds, or transfer stock from one fund to another, it is no conversion. Waite v. Whorwood, 2 Atk. 159.||

So, if the executor sues a person by trover and conversion, in which he has a right to recover; and afterwards he and the defendant come to an agreement that he shall pay the executor such a sum at a future day, and the party fails, this is a *devastavit*; and he shall answer *ad valorem*.

2 Lev. 189; Norden v. Levit, 2 St. T. Jon. 88, S. C., adjudged; 6 Mod. 94, and Vern. 474, S. C., cited, and said to have been affirmed in a writ of error in the House of Lords, and a case cited in Vernon by Lord Chancellor, which he said was adjudged when Pemberton was chief justice, where an executor of an obligee accepted a note drawn upon a goldsmith for the money; the goldsmith accepted the bill, and before payment failed; the executor afterwards brought an action upon the bond, and this matter being given in evidence, was adjudged a good *payment*. || This is most probably the case of Vernon v. Boverie, 2 Show. Rep. 296. See also Cooksey v. Boverie, Ibid.||

So, if an executor submits the debts, or whatever he is entitled to in right of the testator, to arbitration, and the arbitrators award him less than his due; this, being his own voluntary act, shall bind him, and he shall answer for the full value.

Off. of Exec. 71, 159; 3 Leon. 51. β In Virginia, an executor may submit any account of his testator to arbitration. 1 Brockenb. C. C. R. 228. The same rule has been adopted in Connecticut. Alling v. Munson, 2 Conn. 691.*g*

|| A submission to arbitration by an executor or administrator is in general considered as a reference, not only of the cause of action, but also of the question, whether or not he has assets; and therefore if an arbitrator, under a reference between A and B, administrator, award that B shall pay a certain sum as the amount of A's demand, B cannot afterwards object that he had

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no assets ; for this is equivalent to determining, as between these parties, that he had, and therefore he may be attached for non-payment.

Worthington v. Barlow, 7 T. R. 453 ; Barry v. Rush, 1 T. R. 691.

But a submission to arbitration by an executor or administrator, is not of itself holden to be an admission of assets ; and therefore if upon such a submission, the arbitrator simply award a certain sum to be due from the testator's or intestate's estate, without saying by whom it is to be paid, the executor or administrator is not personally liable to the payment of the sum awarded, nor can he be attached for the non-payment of it.

Pearson v. Henry, 5 T. R. 6.||

If an executor neglects to pay interest, and afterwards acknowledges a judgment for principal and interest, this is a *devastavit*, unless he shows want of assets to pay interest, &c.

2 Lev. 40.

|| If an executor by his delay in commencing the action has enabled the debtor of his testator to protect himself under the plea of the statute of limitations, this is a *devastavit*.

Per Holt, C. J., 12 Mod. 573 ; *β*Long's Estate, 6 Watts, 46.g

Where an executor had lost a bond for money due to his testator, the Court of Chancery was inclined to charge him with the debt : but for the present directed only, that he should prosecute a suit instituted by him against the obligor with effect, in order to recover the money, and respited judgment in the mean time.

Goodfellow v. Burchett, 2 Vern. 299.

If an executor neglect to call in money lent by his testator on bond, and the obligor become bankrupt, the executor will be personally answerable for it ; and cannot protect himself by showing that he made application to the obligor for payment by an attorney.

Powell v. Evans, 5 Ves. 839 ; Lowson v. Copeland, 2 Br. Ch. Rep. 156. *β*Executors who permitted the assets to lie in the hands of a banker unproductive for more than one year, who afterwards failed with the money in his hands, were held to be chargeable with the loss. Alder v. Park, 5 Dowl. P. C. 16.g

If an acting executor has once received and fully had under his control assets of his testator applicable to the payment of a bond debt, he is responsible for the application of it to that purpose ; and in an action on the bond cannot protect himself under the plea of *plenè administravit*, by showing that such application had been disappointed by the misconduct of his co-executor, to whom he had paid over the money for the purpose of satisfying the debt ; for he is liable for the consequences of such misconduct as much as if it had been by that of any other agent.

Crosse v. Smith, 7 East, 246.

If an executor retain money in his hands for any length of time, which, by application to the court, or vesting in the funds, he might have made productive, he shall be charged with interest for it. By vesting it in the (a) funds, provided it be in the 3 *per cents.*, (b) he is not answerable for the fall of the stocks ; nor, if he put it out on real security, (c) which at the time there was no ground to suspect, is he responsible for the loss of it, though he did so without the indemnity of a decree.

2 Fonbl. Eq. Tr. 185, 2d edit. ; Bird v. Lockey, 2 Vern. 744 ; Littlehales v. Gascoigne, 3 Br. Ch. Rep. 73 ; Franklin v. Frith, Ibid. 433 ; Perkins v. Baynton, 1 Br. Ch. Rep. 375. (a) *Ex parte* Champion, cited in Hutcheson v. Hammond, 3 Br. Ch.

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Rep. 147; and *Franklin v. Frith*, *ubi supra*; *Cowper v. Douglass*, 2 Br. Ch. Rep. 231. (b) He is protected if he lay it out in the 3 *per Cents.*, because he does that which the court would order him to do, that fund being adopted by the court as the more equal and lasting. *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Holland v. Hughes*, 16 Ves. 111; *Haneom v. Allen*, 1 Dick. 498. (c) By Lord Harecourt, C., 1 P. Wms. 141.

If an executor has merely retained money in his hands, which, either in compliance with the express directions of the will, or from his general duty, even where the will is silent, he ought to have laid out, if there be nothing more proved, he shall be charged with interest only at the rate of 4*l. per cent.* To charge him at a higher rate of interest a special case is necessary: there must be proof of something else than mere negligence. (a) Compound interest has been given, (b) in a case of wilful violation of the will, which prohibited retainer, and directed accumulation. (c) And in a late case in the House of Lords, an administrator was charged with the full legal interest on a sum retained by him undistributed, during the whole period of retention, though twenty years had elapsed before an effectual suit for an account had been commenced; and the account was also ordered to be taken with annual rests, and interest charged on the annual balances.

*Newton v. Bennett*, 1 Br. Ch. Rep. 359; *Perkins v. Baynton*, *Ibid.* 375; *Treves v. Townshend*, *Ibid.* 384; *Browne v. Southouse*, 3 Br. Ch. Rep. 107; *Hall v. Hallett*, 1 Cox, 134; *Forbes v. Ross*, 2 Cox, 116; 2 Br. Ch. Rep. 430, S. C.; *Seers v. Hinde*, 1 Ves. jun. 294; *Piety v. Stace*, 4 Ves. 620; *Pocock v. Reddington*, 5 Ves. 794; *Roeke v. Hart*, 11 Ves. 58; *Ashburnham v. Thompson*, 13 Ves. 102, and cited in 1 Madd. 303; *Tebbs v. Carpenter*, 1 Madd. 290. (a) *Moslay v. Ward*, 11 Ves. 581; (b) *Raphael v. Boehm*, 11 Ves. 92; 13 Ves. 407, 590. (c) *Stackpoole v. Stackpoole*, 4 Dow's P. C. 209.

And the estate of an executor under such a direction to accumulate, who becomes a bankrupt, shall be charged in like manner with interest at 5 *per cent.* and annual rests.

*Dornford v. Dornford*, 12 Ves. 127.

But an executor shall not be charged with interest at all upon a balance retained in his hands under a fair misapprehension that he had a just claim to it.

*Bruere v. Pemberton*, 12 Ves. 386. *β* See *Flintham's Appeal*, 11 S. & R. 16; *Fox v. Wileocks*, 1 Binn. 194; *Callahan v. Hall*, 1 S. & R. 241; *Findley v. Smith*, 7 S. & R. 268; *Merrick's Estate*, 1 Ashm. 305; *English v. Harvey*, 2 Rawle, 305; *Harland's Account*, 5 Rawle, 323; *McCall's Estate*, 1 Ashm. 357; *Billington's Appeal*, 3 Rawle, 48; *Patterson v. Nichol*, 6 Watts, 379; *Hooper v. Brinton*, 8 Watts, 73; *Verner's Estate*, 6 Watts, 250; *Granberry v. Granberry*, 1 Wash. 246; *Cavendish v. Flemming*, 1 Wash. 198; *Patton v. Williams*, 1 Wash. 59; *Wright v. Wright*, 2 M'Cord, Ch. R. 202; *Black v. Blakely*, 2 M'Cord, Ch. R. 10; *Dexter v. Arnold*, 3 Mason, 284; *Goodchild v. Fenton*, 3 Yo. & Jer. 481; *Clay v. Craig*, 7 Dana, 17; *Amos, Administrators v. Heatherly*, 7 Dana, 48; *Ray v. Doughty*, 4 Blackf. 115; *White's Heirs v. White's Administrators*, 3 Dana, 376; *Garrett v. Carr*, 3 Leigh, 407.*g*

Neither shall an executor pay interest merely on the ground of his having called in a debt which bore interest; for he has an honest discretion to call in any debt which he thinks in hazard.

By Lord Thurlow, C., 1 Br. Ch. Rep. 361.

*β* Interest is chargeable on the annual balances in an executor's accounts, unless such balances are unnecessarily kept in his hands for the purposes of the estate.

*Darrel v. Eden*, 3 Desaus. 241; *Benson v. Bruce*, 4 Desaus. 463; *Walker v. Bynum*, 4 Desaus. 555; *Jenkins v. Fickling*, 4 Desaus. 369; *Prewett v. Prewett*, 4 Bibb, 266; *Burwell's Exrs. v. Anderson*, 3 Leigh, 348; *McCall v. Peachy's Admr.s.*, 3 Munf. 288; *Schieffelin v. Stewart*, 1 Johns. Ch. R. 620; *Carmichael v. Wilson*, 4 Bligh, N. S. 145, S. C. 3 Moll. 79.*g*

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Where there were arrears of rent on a lease, and the tenant becoming insolvent, the executor had released the arrears, and given him a sum of money to quit the possession; the executor was allowed both, it appearing that he had thus acted for the benefit of the estate.

Blue v. Marshall, 3 P. Wms. 381.

If A bequeathed all the surplus of his personal estate after payment of his debts and legacies to B, and several creditors, although barred by the statute of limitations, commence actions against the executor; on his refusal to plead the statute, a court of equity will not, in favour of such residuary legatee, compel him to plead it.

Lord Castleton v. Lord Fanshaw, 1 Eq. Ca. Abr. 305; Pr. Ch. 190, S. C.; 15 Ves. 498, S. P.

An executor shall not be charged with a *devastavit* for converting the goods of the testator to his own use, if he has paid debts of the testator in such order as the law appoints to the value of the goods with his own money. Nor shall he be so charged, if he has paid money of his own in satisfaction of a debt of an inferior nature, where he has retained the assets in his hands; for this does not change the property of the assets, but they remain as against a creditor of a debt of a superior degree in the same plight they were before, and may be seized in execution in specie at such creditor's suit as the goods of the testator, notwithstanding such payment of a debt of an inferior degree.

1 Saund. 307; 1 Saund. 218.||

βExecutors deposited sums with bankers, on notes bearing interest, not requisite for the purposes of the will, and not forming part of the account current: on failure of the bankers they were held personally liable for the loss.

Darke v. Martyn, 1 Beav. 525.g

||It does not amount to a *devastavit* if an executor lend out money of the testator, not wanted for the uses of the will, on private security, provided he exercises a fair and reasonable discretion on the subject.

Webster v. Spencer, 3 Barn. & A. 360.

Executors ought not, without great reason, to permit money of the testator to remain on personal security longer than is absolutely necessary, especially where infants are concerned; and an executor, on the same principle, is bound to pay into court money due on personal security from himself.

Powell v. Evans, 5 Ves. 839; Eagleton v. Coventry, 8 Ves. 466; and see French v. Hobson, 9 Ves. 103; Wilkes v. Steward, Coop. R. 6.

An executor cannot buy up debts for his own benefit.

*Ex parte* Lacey, 6 Ves. 628; *Ex parte* James, 8 Ves. 346.

An executor bound to accumulate, cannot account as if the money had been laid out in the funds if it was not so laid out, or being so, he had sold out in advance.

Raphael v. Boehm, 11 Ves. jun. 108.

An executor shall be allowed to retain out of a legacy to his co-executors, in respect of a *devastavit* committed by him.

Sims v. Doughty, 5 Ves. 243.

Executors advancing to creditors more than the value of testator's personal estate, require an absolute right to them.

Chalmer v. Bradley, 1 Jac. & W. 65; and see Simmons v. Bolland, 3 Meriv. 547.

An executor's depositing assets as a security for his own debt and for future advances to him, is inconsistent with his duty, though under circum-

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stances indicating that he intended to apply the money borrowed to the purposes of the will.

*Macleod v. Drummond*, 17 Ves. 168.

An executor will be charged with interest on the balances in his hands, though not prayed by the will.

*Turner v. Turner*, 1 Jac. & W. 39; and see *Crackett v. Bethune*, *Ibid.* 586.

Where every thing is left to the discretion of the executors, they will be allowed a payment for mourning rings, though not directed by the will.

*Paice v. Archbishop of Canterbury*, 14 Ves. 364.

A partner, appointed executor by the will of his late partner, was held not entitled to an allowance for carrying on the joint trade after his testator's death, there being no such stipulation; but he was allowed his late partner's share of necessary expenses.

*Burden v. Burden*, 1 Ves. & B. 170; *Freeman v. Fairlie*, 3 Meriv. 24.

An executor is never called on to lodge money in court, except on an affidavit of his insolvency, or where he admits a clear balance in hand after payment of debts.

*Rutherford v. Dawson*, 2 Ball & B. 17; and see 3 Madd. 62; *Coop.* 6.

Where an executrix, in respect of receipts, was much indebted to the estate, an annuity to which she was entitled under the will was applied in payment of the debt.

*Skinner v. Sweet*, 3 Madd. R. 244.||

2. *Where it will be a Devastavit to pay Debts of an inferior Nature before those of a superior; and the Order in which Debts are to be paid.*

The better to consider the order which the law prescribes for the payment of debts, and the duty enjoined executors and administrators in discharging themselves of the assets of the deceased, which they must observe at their peril, it is necessary to take notice, that these debts are divided into three sorts: 1. Debts by record. 2. Debts by specialty. 3. Debts by simple contract.

Off. of Exec. 131.

Debts by record, which are to have the first (*a*) precedency, are again divided into debts due to the crown, debts by judgments obtained in any court of record, and debts by recognisances, statutes merchant or staple.

Off. of Exec. 131. (*a*) [This is not quite correct: funeral and testamentary charges are in the first place to be paid. Off. of Exec. 137; 2 Bl. Com. 511.]

Of these the highest in its nature is the king's debt, and his prerogative to be (*b*) preferred before other creditors arises from the regard the law hath to the public good beyond any private interest.

2 Inst. 32; Off. of Exec. 132; *Cro. Eliz.* 793. (*b*) But it is said, that if there be a debt owing to the king, equity will order it to be paid out of the real estate, that other creditors may have satisfaction of their debts out of the personal assets. *Vern.* 455.

Therefore if an executor, whose testator was indebted by matter of record to the king, be sued by judgment, or any other creditor, he may plead in bar, that his testator died so much indebted to the king, (*c*) showing how; and that he hath not assets above the value of that debt; and this will be a good plea. So, if a creditor pursues his remedy by suing out execution upon a statute merchant or staple, the executor upon setting forth this matter will be relieved on an *audita querela*.

Off. of Exec. 132. (*c*) In debt upon an obligation against an executor, who pleaded,  
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that the testator, *tempore mortis suæ*, was indebted to the king for the office of sheriffship; and because it was not averred that it was *verum et justum debitum et minime solutum*, it was demurred in law, and without argument (because an injunction was served out of the Exchequer) adjudged for the plaintiff. Cro. Ja. 182; Wodell v. Hungeate. But, where in debt against an executor, he pleaded that the testator entered into a bond in such a penalty to J S, conditioned to pay so much money, which was not yet paid, beyond which he had not assets; and there was a special demurrer to this plea, because the defendant did not aver (as he ought) that the bond was entered into by the testator *pro vero et justo debito*, the court held the plea good without such an averment; for it shall be intended the bond was given for a just debt, and the obligation itself shall be sufficient to charge the executor, though the testator never received any money thereon. Lake v. Raw, Carth. 8. If the debt be not a just one, the other side may show it in his replication. Further v. Further, Cro. Eliz. 471; Phillips v. Echard, Cro. Ja. 8, 35; Palmer v. Lawson, 1 Lev. 200; 1 Sid. 333, S. C.; Williams v. Fowler, 1 Str. 410; Robinson v. Corbitt, 1 Lutw. 662.

But the debts due to the crown, which are to have a precedency, must be understood of debts by matter of record; and therefore, sums of money due to the king upon wood sales, sales of tin, or other his minerals, for which no specialty is given, are not to be preferred to the subject's debt by matter of (a) record.

Off. of Exec. 138. (a) But, it seems, that if the king's debt, and likewise that of a subject, be both inferior to debts of record, the king shall be preferred. || It hath been holden, that a debt upon simple contract to the king shall be paid before a debt by bond to a subject, although he was himself the administrator. Rex v. Burnett, Hil. 1681, Exch.; Law of Wills, 434.||

So, of amercements in the king's courts baron, courts of his honours which be not of (b) record; also of fines for copyhold estates, or money for which strays within the king's manors, or liberties, are sold; these are not debts by record.

Off. of Exec. 133. (b) But as to fines and amercements in the king's courts of record, there is no doubt but they are debts of record. Off. of Exec. 134, 135.

Also, whatever accrues to the king by an attainder or outlawry is to be considered as a debt by single contract before office found; for though the debts due to the person outlawed, or attainted, were by matter of record, and although the outlawry and attainder are upon record, yet the king's title also must appear on record, which cannot be before office is found.

Off. of Exec. 133.

Also, it is said, that the arrearages of rent due to the king, whether it be a fee-farm rent, or rent reserved on a lease for years, are to be considered as a debt by simple contract.

Off. of Exec. 134.

Next to the king's debts on record, are judgments (c) to be paid; for these in regard of the solemnity of them are of greater (d) notoriety than recognisances or statutes; for though these likewise be of record, yet, as they are entered into by the private consent and agreement of the parties, they are not esteemed securities of as high a nature in the eye of the law, as judgments, which are presumed to be given *invitè*, though voluntarily acknowledged by the party.

Off. of Exec. 135; Ro. Abr. 296; Cro. Eliz. 793. || This preference is given not only to the judgments of the courts of Westminster Hall, but to those of every court of record in the kingdom; for it is founded upon this, that the judgments of all courts, upon matters or persons within their jurisdiction, are conclusive so long as they are in force, and the parties are bound to yield obedience to them; and the obligation to obedience follows the assets in the hands of the executor or administrator. Ca. tem. Talb. 221. The judgments of inferior courts have indeed so far the advantage, that of

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them the executor is bound to take notice at his peril, 3 P. Wms. 117; Off. of Exec. 139; but of a judgment of any of the superior courts he is not bound to take notice unless it be docketed according to the statute 4 & 5 W. & M. c. 20; for if it be not docketed, it is no other than a judgment in a foreign country, a mere simple contract debt, Walker v. Whitter, Dougl. 1; Hickey v. Hayter, 6 T. R. 384, and, of course, not pleadable against a demand on simple contract. Steel v. York, 1 Bos. & Pull. 307. (c) [That is, judgment obtained against, or confessed by the testator; not the executor; for to these, this priority doth not extend; Off. of Exec. 137; nor will it prevail against certain debts by particular statutes, as the forfeitures for not burying in woollen, 30 Car. 2, c. 3; money due from the overseers of the poor, 17 Geo. 2, c. 38, § 3; for letters to the post-office, 9 Ann. c. 10, § 30, &c.] (d) An executor shall discharge a subsequent judgment before a prior statute, because of the notoriety of it. 4 Co. 59. — But, if the statute be extended, whether the judgment creditor may enter on the connise, *qu.*; and vide 2 And. 157; Cro. Eliz. 734, 822. It is said to have been decreed at the rolls, that mortgages were to be paid in the first place, and then judgments, and then recognisances; but that upon appeal to the House of Lords it was adjudged, that mortgages were not to be preferred to other real encumbrances; but that mortgages, judgments, statutes, and recognisances should take place according to their priority, and as they stood in order of time. 2 Vern. 524. But for this, and the order in which debts must be paid in equity, and the difference between legal and equitable assets, vide Abr. Eq. 141, &c., 235, &c.

Therefore if a *scire facias* be brought against an executor on a judgment against his testator, he cannot plead *plene administravit*; for a judgment being to be paid next to the king's debt, the executor ought to show that he laid out the assets in discharging the king's debt, or in satisfying some other judgment; otherwise it might be, that he administered the assets in discharging statutes, recognisances, or debts on specialty; which he could not do before a debt on a judgment.

Cro. Eliz. 575; Ordway v. Godfrey, Allen, 48; Moor, 858; Stil. 56, Dub.; Raym. 230, Dub.; 3 Keb. 258, Dub.; but Comb. 298; Ld. Raym. 3; Salk. 296, pl. 5; 4 Mod. 296, S. C. and S. P.; and there held, that such a plea is good on a general, though not on a special demurrer. — And by the Off. of Exec. 137, it is said, that an executor may, to such a *scire facias*, plead generally, that he hath fully administered, without showing that he did administer in payment of debts of as high a nature; but yet that must be proved upon the evidence, else the trial will fall out against the executor.

But, if the judgment be satisfied, and only kept on foot to (a) wrong other creditors; or if there be any defeasance of the judgment yet in force, the judgment will not avail to keep off other creditors from their debts.

Off. of Exec. 136. (a) For pleading that a judgment is kept on foot by fraud and covin, vide 8 Co. 132; 9 Co. 108; Ro. Abr. 801; Sir W. Jon. 91; Vaugh. 103, 104; Saund. 336; 2 Saund. 48; 2 Keb. 591; Mod. 33; Lev. 281; Sid. 333; Salk. 298; 4 Mod. 63; 2 Mod. 36; Ld. Raym. 283; Carth. 429; 12 Mod. 153, 229; Comb. 444, 449; Litt. Entr. 158.

It has been holden, and seems now agreed, that a decree in a court of equity is equal (b) to a judgment at law; and that the filing of a bill in equity is of equal force to the filing of an original at law, to prevent the alienation of assets; and therefore where an executor, though without notice of a decree, paid a debt due by specialty, he was decreed to pay it over again out of his own pocket.

Vern. 143; 3 Lev. 355; 2 Vern. 37, 88. [Pr. Ch. 179, 188; Bunb. 48; Ca. temp. Talb. 217; 2 Atk. 385.] Though the contrary is holden, Ro. Abr. 377; Stil. 38. (b) [That is, in the course of administration of assets, but not so as to affect the lands of the debtor. 1 Ves. 496; 2 P. Wms. 621. However, there have been cases, where even decrees have been holden to bind lands, and where decrees are to hold and enjoy over. Ca. temp. Talb. 222.]

As to statutes and recognisances, they are of an equal degree, and to be paid next to judgments; and therefore the executor, where there are several

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conusees, may prefer a subsequent statute to a prior; for each statute equally affects the personal estate, though as to lands the first shall have precedence.

Off. of Exec. 138; Dyer, 80; Ro. Abr. 925; Bridgm. 79, 80. But for this vide tit. *Execution*.

But, if the testator had entered into a statute for performance of (a) covenants, and none of them were broken, in an action of debt against the executor on a specialty, he cannot plead this statute; for perhaps the covenants may never be broken, and it would be unreasonable to allow the executor to ward off a just debt upon a contingency that may never happen.

5 Co. 28; Harrison's case, Ro. Abr. 925; Cro. Ja. 8; Cro. Car. 362. (a) Or for payment of money when an infant shall come of age. 5 Co. 28, and vide Ro. Abr. 925, 926.

|| A recognisance not enrolled shall be considered as a bond, and payable accordingly, the sealing and acknowledgment of it supplying the want of a delivery.

Bothomly v. Ld. Fairfax, 1 P. Wms. 334; 2 Vern. 750, S. C. See Fothergill v. Kendrick, 2 Vern. 234.

So, a statute not regularly taken may be good as an obligation.

Hollingsworth v. Ascue, Cro. El. 355, 461, 494, 544; Moore, 405, S. C.; but *contr.*, and evidently referring to this report, it is laid down in the Touchstone, 58, that a statute so taken does not amount to an obligation. But Croke's report is full and correct.||

Debts by specialty, as those by bonds, &c., sealed by the testator, are next to be paid.

Off. of Exec. 41.

Also, it has been adjudged, that, if an action be brought against an executor on a simple contract of his testator's, he may plead that his testator entered into a bond payable at a future day, and this will be a good bar. (b)

Cro. Eliz. 315; 3 Lev. 57, S. P.; Cro. Car. 362, S. P. (b) [But this will cover assets no further than the amount of the sum payable by the condition. Ca. temp. Hardw. 228.]

|| A contingent security, for example, a bond to save harmless, shall not stand in the way of a debt by simple contract, as to the administration of assets. And, if subsequently to the payment of the simple contract debt, (c) the contingency should happen, it seems reasonable that evidence of such payment should be admitted on the executor's plea of *plene administravit* to an action by the specialty creditor.

Toll. Exors. 282; Eels v. Lambert, as cited in 2 Vern. 101; All. 40, S. C.; Strgl. 37, 54, 73, S. C.; Hawkins v. Day, Ambl. 160. (c) Allen, 40, but see Woodcock v. Hern, Goldsb. 142.

But, when the contingency has happened, although the debt consequent upon it has not been paid, it may be pleaded to an action by a simple contract creditor; as, where the testator had executed a bond to A in 2800*l.*, condition to indemnify him against another bond for 800*l.*, which he had executed jointly with the testator to B for the debt of the testator, in whose lifetime the 800*l.* had become due and were still unpaid; upon the executrix's disclosing these facts in a plea to an action of *assumpsit*, and stating that she had fully administered, except so much, which was subject to the satisfaction of this indemnity bond, it was holden to be a sufficient defence.

Toll. Exors. 202; Cox v. Joseph, 5 T. R. 307.||

[The grantor's covenant in a marriage-settlement for him and his heirs,



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that the premises were free from encumbrances, shall rank equally with debts on bond.

Parker v. Harvey, Vin. Abr. tit. *Executors*, (Q. a.) pl. 39.

If two men are partners in trade, and one of them gives a bond to leave his wife 1000*l.*, and dies, and the other partner administers; if the wife would be paid out of the separate estate of the husband, on there being effects, she shall have a preference before other creditors; but, if there is no separate estate, and the wife would have satisfaction out of the partnership effects, then all the partnership debts must be first paid.

Croft v. Pye, 3 P. Wms. 182.]

Also, rent arrear and unpaid by the testator is equal to a debt by specialty; for this savouring of the realty, and maintained from receiving the profits of the land, the executor can no more wage his law against such a debt than he can against a debt by specialty. *Ergo*, it is more than a mere personalty.

Off. of Exec. 145; Ro. Abr. 927.

So, where debt was brought against an executor for rent reserved on a parol lease, after the lease was determined, and the executor pleaded that the testator entered into an obligation, and that he had not assets *ultra 5*l.**, which were not sufficient to discharge this obligation; on demurrer it was resolved, that this rent, though reserved on a parol lease, was yet equal to an obligation; and that the contract still remained in the realty, though the term was determined, and no distress now.

3 Lev. 267; Newport v. Godfrey, 4 Mod. 44; 2 Vent. 184, S. C., adjudged; Comb. 183; Ver. 490, Willett v. Earle; Gage v. Acton, Com. Rep. 67; Stonehouse v. Ilford, Ibid. 145, S. P.]

Also, by the custom of London, if a citizen of London dies indebted by simple contract, such debt is equal to a debt by specialty, and shall bind the plaintiff, though a stranger, and no citizen.

Snelling's case, 5 Co. 82 b; Cro. Eliz. 409, S. C.; Noy, 53, S. C.; Ro. Abr. 557, S. C.; See Scudamore v. Hearne, Andr. 340.

Debts by simple contract are postponed to all(*a*) others, being debts of an inferior nature; yet an executor is bound, as far as he has assets, to pay them, as much as any other debt; and therefore a simple contract creditor need not allege, that the executor had assets to satisfy debts of a superior nature, and his also; but, if the truth be, that the executor has only assets sufficient to satisfy such superior debts, he must plead it.

9 Co. 88; Off. of Exec. 155; Ro. Abr. 921; 5 Co. 82. (*a*) It is said that debts due for servants' wages on the statute of labourers, shall be paid before debts by simple contract. Ro. Abr. 927.—If a man recovers a judgment, or has a sentence in France for money due to him, the debt must be considered here only as a debt due on simple contract. 2 Vern. 540; Walker v. Whitter, Dougl. 1.—Also in equity it hath been ruled, that a voluntary bond shall not, in a course of administration, take place of real debts, though by simple contract; but shall, notwithstanding, be paid before legacies. Abr. Eq. 143, 144; 3 P. Wms. 222; Com. Rep. 255.

But, though the law requires that debts should be paid according to their superiority, as herein set forth, yet may an executor pay a debt on a simple contract before(*b*) a specialty, if he has no(*c*) notice of such specialty; for otherwise it might be in the power of the obligee to ruin the executor, by keeping his bond in his pocket until he had paid away all the assets in discharging simple contract debts.

Keilw. 51; Plow. 279; 2 And. 157; Harman v. Harman, 2 Show. 492, pl. 457; 3 Mod. 115, S. C.; Edgecombe v. Dee, Comb. 35, not determined; 3 Lev. 113, 114; Vaugh. 94. [In the case of Harman v. Harman, as reported in Shower, and 3 Mod.

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the court agreed, that a judgment upon a simple contract debt may be pleaded in bar to an action of debt upon bond, and that it is no *devastavit* in an executor to pay a debt upon such a contract before a bond debt of which he had no notice; and they relied on the cases of *Edgecombe v. Dee*, and *Brooking v. Jennings*, 1 Mod. 174, but it was adjourned; and afterwards, according to *Comberbach*, judgment was given for the plaintiff. But from a later case of *Davis v. Monkhouse*, Fitzg. 76, Bull. N. P. 178, it seems to be settled, that an executor may plead a *judgment recovered* on a simple contract to an action of debt on bond, unless he has notice of such bond, and that for the reason given in the text. But where an executor to an action of debt upon bond pleaded a judgment *confessed* on the preceding day on a simple contract debt, the plea was disallowed, because it did not aver that it was without notice of the plaintiff's demand, for in such case only is an executor excused in confessing a judgment. *Sawyer v. Mercer*, 1 T. R. 690.] (b) But, where to a *scire facias* against executors, upon a judgment against their testator in debt, they pleaded, that before they had any consueance of this judgment, they had fully administered all their testator's goods, in paying debts upon obligations; upon demurrer it was adjudged a bad plea, for they at their peril ought to take consueance of debts upon record; and ought first of all (unless for debts due to the crown) to satisfy them; and although the recovery was in another county than where the testator and executors inhabited, it is not material. *Cro. Eliz.* 793; *Littleton v. Hibbins*, and vide 3 Mod. 115; *Abr.* 236. (c) It is said, that notice must be by action, 1 Mod. 174, [or bill in equity. 2 Vern. 37, 88; 3 P. Wms. 402, note; 2 Bl. Comm. 512, but *qu.*]

Also, (a) where there are several creditors in an equal degree, the executor may prefer which he pleases; and (b) may, when a creditor himself, retain assets against those who are in an equal degree with himself.

(a) For this vide Off. of Exec. 142; *Dyer*, 22; *Ro. Abr.* 926; *Sid.* 21. β An executor's right to retain extends to debts due to him jointly with others, or to debts due to him in the character of trustee, as well as those which are due to him solely in his own right. *Hosack v. Rogers*, 6 Paige, 415. g [As this power may be an inlet to fraud, the Chancery will sometimes interpose. 10 Mod. 496.] (b) [There is one exception to the rule that an executor *de son tort* cannot retain, and that is where he has become such by force of the st. 43 Eliz. c. 8, in consequence of a gift to him of the intestate's effects by an administrator, who has obtained the grant fraudulently; in which case he is, by the express provision of that statute, allowed to retain. Com. Dig. *Adm.* C; 2 H. Bl. 26, in note; *Toll. Exec.* 366. As an executor *de son tort* cannot, except in this case, retain, a defendant, to entitle himself to retain, must show in his plea that he is rightful executor. *Prince v. Rowson*, 1 Mod. 208; 2 Mod. 51, S. C.; *Calverly v. Ellison*, Sir T. Jon. 23. But a retainer may either be given in evidence on *plene administravit*, or pleaded specially. *Loane v. Casey*, 2 Bl. Rep. 965; *Plumer v. Marchant*, 3 Burr. 1383; *Warner v. Wainsford*, Hob. 127; *Bond v. Green*, 1 Brownl. 75; *Shelly v. Sackville*, Moore, 2; *Anders*, 24, S. C.; *Bendl*, 11, S. C. An executor or administrator may retain out of the assets a debt due in trust for himself. *Cockroft v. Black*, 2 P. Wms. 208; *Weeks v. Gore*, 3 P. Wms. 184, in note (B); *Rockelly v. Godolphin*, 2 Show. 403; *Skin*, 214, S. C.; *Sir T. Raym.* 483, S. C.]]

[If a man has covenanted with B and C to leave by his will, or that his executors within six months after his death shall pay 700*l.* to them, in trust to pay the interest to his wife for life, then to be divided among his children, and in default of children, as he shall appoint; and bound himself, his heirs, &c., in a penalty for performance, and dies without issue, and intestate; if B administers, he may retain assets against a bond creditor who sues him before the six months are elapsed.

*Plumer v. Marchant*, 3 Burr. 1380.] [An executor taking in a bond and giving another in his own name for the same sum, may retain. *Stamp v. Huthins*, Moore, 260; *Cro. El.* 120, S. C.; 1 Leon. 3, S. C.; *Dy.* 2, S. C., cited in margin; *Martin v. Alice Whipper*, *Cro. El.* 114, S. P.; *Briers v. Goddard*, Hob. 250, S. P. But an executor appointed to sell land cannot retain the land, and pay so much as it is worth, and as much as testator appointed upon the sale, as he may in case of goods; for his authority is only to sell the land; but in goods he has an interest. *Jenk.* 189; *Keilw.* 586. Though an administrator die before he appropriates the assets in the payment of his debt, yet his executor is entitled; 3 P. Wms. 184, in note: but an executor of an

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executor cannot, it seems, retain, unless he be also executor to the first testator. *Hopton v. Dryden*, Pr. Ch. 180. See *Croft v. Pyke*, 3 P. Wms. 183, where the point is discussed, but not decided.||

||Where A being indebted in his individual capacity to a house in trade of which he was himself a partner, in a sum of money, the amount of which could not be exactly ascertained, covenanted to pay the firm all his then debts, and such other debts as should subsequently accrue; and afterwards died without having discharged the original debt, and having contracted further debts subsequent to the execution of the deed; it was holden, that his executors, two of whom were partners in the house of trade, could not plead either of these debts by way of retainer, or as an outstanding specialty debt. For the deed showed no debt at law; and though a court of law has taken notice, as it had been urged, of a debt in trust; yet that was in a case where there was no difficulty of trial, where the amount of the debt was easily ascertained; but in the present case the debt constituted an item in a partnership account, and could not be ascertained without taking the account, and that could not be taken by a jury.

*De Tastet v. Shaw*, 1 Barn. and Alders. 661; *Plumer v. Merchant*, *ubi supra*.||

[But with respect to debts in equal degree, if a suit hath been commenced for any one, such debt shall be first paid; for after a suit begun, an executor (it hath been holden) may not excuse himself by any voluntary payments. Yet it is said, that the executor, before notice of such suit, may pay any other creditor in equal degree, and then plead that he hath fully administered before notice.

2 Ch. Ca. 201; 2 Vern. 62; *Br. Executors*, pl. 43; *Went*. 146.

And it was holden by Lord Cowper, that pending a bill in equity (*a*) against an executor, or after a decree *quod computet*, an executor may pay any other debt of a higher nature, or of as high a nature, if there be *legal* assets; but, if he hath only *equitable* assets, then the Court of Chancery will not indemnify him, and suffer him to prejudice and disappoint the first suitor. But he cannot do so, his lordship added, after a final decree.

*Mason v. Williams*, 2 Salk. 507; *Smith v. Eyles*, 2 Atk. 385; *Worsley v. Earl of Scarborough*, 3 Atk. 392. (*a*) See the case of *Dorston v. Earl of Oxford*, 3 P. Wms. 401, n., where a voluntary payment made by an executor of a debt in equal degrees, pending a suit in equity, was allowed.—See too the case of *Waring v. Danvers*, 1 P. Wms. 295, where, after an action at law brought by one creditor, an executor confessed judgments to other creditors, and equity would not interpose.

Where a creditor sues an executor at law and in equity at the same time for the same demand, equity will not compel him to make his election in which of the courts he will proceed, in case the executor is attempting to prefer other creditors before him, by confessing judgments to them; but will merely restrain him from taking out execution upon the judgment without leave of the court.

*Barker v. Dumeres*, *Barnardist. Ch. Ca.* 277.

Where there are only *equitable* assets, the Court of Chancery will direct the application of them according to that course which is most just, namely, to pay every creditor his share in proportion. So, where the assets are partly *legal* and partly *equitable*, although the court cannot take away the legal preference on legal assets, yet where one creditor hath been partly paid out of such legal assets, when satisfaction comes to be made out of *equitable* assets it will postpone him till there is an equality, in satisfaction

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to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor hath been satisfied out of the legal assets.

For the distinction between *legal* and *equitable* assets, vide *supr.* (H.) Ca. temp. Talb. 220; 2 Vern. 435.]

||If an annuity be secured by bond in bar of dower, the widow is entitled to be paid, in the first place, out of the personal estate, and in aid of that (*a*) is entitled to come upon such real estate as would have been liable to dower.

Tew v. Earl of Winterton, 1 Ves. jun. 451. 3 Br. Ch. Rep. 489, S. C. (*a*) This has been said to be by a very *subtle equity*.||

### 3. Of paying Legacies before Debts; and therein of the Executor's Assent to a Legacy.

Legacies are properly recoverable in the spiritual court, yet (*b*) if an executor pays legacies before debts, though by simple contract, it is a *devastavit* in him.

Off. of Exec. 26; Keilw. 128; Dyer, 254. [But where lands are devised for payment of debts and legacies, and the debts are such as land is not liable to satisfy, as debts by simple contract; there, it is said, the debts shall have no preference of the legacies; but, if there be not sufficient to pay all, they shall be paid in proportion. 2 Freem. 270. So, if a man bind himself in an obligation to perform a certain thing, and devise divers legacies, and die, leaving only sufficient to satisfy the obligation, if this should come to be forfeited; yet this obligation shall not be any bar of the legacies, because it is uncertain whether it will ever be forfeited; but the executor shall make a conditional delivery of the legacy, (to wit,) that if the obligation should be recovered against him, the legatee shall redeliver the legacy. 1 Ro. Abr. 928.] (*b*) And therefore if the spiritual court go about to compel an executor to pay a legacy without security to refund, a prohibition shall go. Vern. 93. [In the case of the Governor, &c., of Chelsea Water Works v. Cowper, 1 Esp. Rep. 276, Lord Kenyon was of opinion, that where an executor had satisfied the debts and legacies, and paid over the remainder to the residuary legatee after the year, without having had notice of any other subsisting demand, this was good evidence on a plea of *plenè administravit* to an action brought against him by a creditor twenty-two years afterwards.]

And as the law makes it a *devastavit* in the executor to pay legacies before debts; so it prohibits the legatee from meddling with the legacy without the assent of the executor; and therefore it hath been holden, that if a legatee takes possession of the thing devised, without the assent of the executor, that he may have an action of trespass against him.

Godolph. 148, 149; Off. of Exec. 27.

But as it is the will of the testator which gives the interest to the legatee, so this matter of assent seems only a perfecting act for the security of the executor; and therefore the law does not require any exact form in which it is to be made. Hence any expression or act done by the executor, which shows his concurrence to the thing devised, will amount to an assent.

Off. of Exec. 29; Godolph. 148; Plow. 525.

If A devises a term to B for life, remainder to C, and the executor assents to the devise to B, this will amount to an assent to the devise over to C, and vest the interest in him accordingly.

4 Co. 28; 3 Co. 96.

If one is himself both executor and devisee, and he enters generally without claim or demonstration of election, he shall have the thing devised as executor, which is his first and general authority.

10 Co. 47; Plow. 520 a; Dyer, 277 b, 367; Cro. Eliz. 223; 2 Co. 27 b; Young v. Holmes 1 Str. 70.

So, where a man possessed of a long term devised to his wife for life,

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remainder to trustees for his son's life, &c., and made his wife executrix; it was holden, that the wife took the term wholly as executrix in the first place, till she agreed to the devise. But, it being proved that she said she would take the term according to the will, it was holden by the court to be a sufficient assent.

Garret v. Lister, 1 Lev. 25; Keb. 15, S. C.

So, where in like case the wife said, that the son was to have the estate after her; this was resolved to be a sufficient assent.

Lev. 25.

|| So, where in a like case it was shown that the executor had paid a charge of 50*l.* to which the legacy was subjected, it was holden to be a sufficient proof of his assent.

Young v. Holmes, 1 Str. 70.||

Hence it hath been holden, that if a specific legacy be devised, as three gowns, &c., and the legatee take money in satisfaction of them, that this amounts, 1st, to a consent of the executor to the legacy or devise of them; and then it is a sale of them by the legatee or devisee to the executor for the money *eo instanti*.

Hill. 5 Ann., Becket v. Ball.

|| But, where A devised a term to B for life with remainder over, with a leasing power for twenty-one years, and made B and two other executors, and B entered and was possessed, and alone demised the premises for forty-two years, reserving rent to himself, his executors, &c., it was holden, that neither his entry on the land, nor his sole lease reserving rent as above, which was alike inconsistent with his interest as tenant for life, and his duty as executor, should be deemed an assent to the legacy; and that the lease should therefore take effect for the whole forty-two years out of the lessor's legal interest as executor.

Doe v. Sturges, 7 Taunt. 217.||

See further tit. LEGACIES, (L).

### 4. What shall be allowed on account of Funeral Expenses.

An executor may lay out so much of the testator's assets as are necessary for defraying his funeral expenses, before he has paid any of his debts or legacies.

37 H. 6, 30; Ro. Abr. 926. *β*An executor who gives no orders for the funeral of his testator, is liable only for the expenses of a funeral suitable to the rank and circumstances of his testator. And, it seems, he is not liable at all when the funeral is ordered by another person to whom the undertaker gives credit. *Brice v. Wilson*, 3 Nev. & M. 512. But he is liable when he ratifies the order. *Lucy v. Walrond*, 3 Bing. N. S. 841. In general, funeral expenses are a charge upon the assets, independently of any promise of the administrator. *Parker v. Lewis*, 2 Dev. 21; *Truman v. Tilden*, 6 N. H. Rep. 201.*g*

And herein the executor is to be careful that the expenses be moderate, and not exceeding the (*a*) degree and circumstances of the deceased; otherwise he may be guilty of a *devastavit*.

Off. of Exec. 129; Supplem. to Wentw. 37, 130; Comb. 342. *β**Edwards v. Edwards*, 4 Tyr. 438; 2 C. & M. 612; *Walker v. Taylor*, 6 C. & P. 752; *Reeves v. Ward*, 2 Scott, 390; 2 Bing. N. R. 235; 1 Hodges, 300.*g* (*a*) Where the Court of Chancery allowed 600*l.* as a reasonable sum, in defraying the funeral expenses of a man of great estate and reputation in his country, and being buried there; but if he had been buried elsewhere, it seems his funeral might have been more private, and the court would not have allowed so much. Pr. Ch. 27.

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And, in strictness, it is said, that no funeral expenses are allowable against a creditor, except for a coffin, ringing of the bell, parson, clerk, and bearers' fees, but not for pall or ornaments.

1 Salk. 296. [In Comb. 342, Holt, Ch. J., is represented to have said, that 10*l.* is enough to be allowed for the funeral of one in debt. *β*Executors and administrators cannot furnish articles of mourning to any of the family, at the expense of the estate. *Griswold v. Chandler*, 5 N. H. Rep. 492.*g*

|| "At law," says Lord Hardwicke, "where a person dies insolvent, the rule is, that no more shall be allowed for a funeral than is necessary; at first only 40*s.*, then 5*l.*, and at last 10*l.* I have often thought it a hard rule, even at law, as an executor is obliged to bury his testator, before he can possibly know whether his assets are sufficient to pay his debts. But a court of equity is not bound down by such strict rules, especially when a testator leaves great sums in legacies, which is a reasonable ground for an executor to believe the estate is solvent." And in the case then before him, his lordship, from the circumstances, thought 60*l.* not too much for the funeral expenses.||

*Stag v. Punter*, 3 Atk. 119.||

As against a creditor, the rule of law is, that an executor shall be allowed no more for funeral expenses than is absolutely necessary, regard being had to the degree and condition of the deceased; and therefore where the deceased had been a captain in the army, and at the time of his death was on half-pay, 79*l.* was held too large a sum as against a creditor. *Seem* that in such a case 20*l.* is a reasonable sum as against a creditor.

*Hancock v. Podmore*, 1 Barn. & Adol. 260.||

[(L 2) Where the Personal Estate shall be first applied in Discharge of Debts, &c. And herein of marshalling the Assets.]

THE general rule is, that the personal estate of a testator shall in all cases be primarily applied in the discharge of his *personal* debt, (or general legacy,) unless he by express words or *manifest* intention exempt it.(a)

1 Cox's P. Wms. 291; *Haslewood v. Pope*, 3 P. Wms. 324; *French v. Chichester*, 1 Br. P. C. 192; *Fereyes v. Robertson*, Bunb. 302; *Walker v. Jackson*, 2 Atk. 624; *Bridgeman v. Dove*, 3 Atk. 202; *Earl of Inchiquin v. French*, Ambl. 33, and 1 Wils. 82; *Samwell v. Wake*, 1 Br. Ch. Rep. 144; *Duke of Auncaster v. Mayer*, Ibid. 454; *Gray v. Minnethorpe*, 3 Ves. 103; *Brummel v. Prothero*, Ibid. 111; *Manning v. Spooner*, Ibid. 117; *Tate v. Lord Northwick*, 4 Ves. 816. *β**McDowell v. Lawless*, 6 Monr. 141; *Wyse v. Smith*, 4 Gill & Johns. 295; *Haleyburton v. Kershaw*, 3 De saus. 105, 115.*g* (a) That it may be so exempted, see *Bampfild v. Wyndham*, Pr. Ch. 101; *Wainwright v. Bendlows*, 2 Vern. 718, and Ambl. 581; *Stapleton v. Colville*, Ca. temp. Talb. 202; *Walker v. Jackson*, 2 Atk. 624; *Anderton v. Cooke*, and *Kynaston v. Kynaston*, cited in 1 Br. Ch. Rep. 456, 457; *Holiday v. Bowman*, cited in 1 Br. Ch. Rep. 145; *Webb v. Jones*, 2 Br. Ch. Rep. 60; *Burton v. Knowlton*, 3 Ves. 107; *Reade v. Litchfield*, Ibid. 475; *Milnes v. Slater*, 8 Ves. 305. *β**Seaver v. Lewis*, 14 Mass. 83; *Waise v. Whitfield*, 8 Vin. Abr. 437, tit. *Devise*, Zd. pl. 19; *Bicknell v. Page*, 2 Atk. 79; *Adams v. Meyrick*, 1 Eq. Cas. Abr. 271, pl. 13; *Gaskill v. Hough*, cited 3 Ves. 110; *March v. Fowke*, Finch. R. 414; *Atty. Gen. v. Barkham*, cited Cases temp. Talb. 206; *Williams v. Bishop of Llandaff*, 1 Cox, 254; *Webb v. Jones*, 1 Cox, 245; *S. C.* 2 Bro. C. C. 60; *Hancox v. Abbey*, 11 Ves. 179; *Vandeleur v. Vandeleur*, 9 Bligh, 157; *Welby v. Rockliffe*, 1 Russ. & M. 517; *Blount v. Hipkins*, 7 Sim. 43; *Mitchell v. Mitchell*, 5 Madd. 69; *Gittens v. Steele*, 1 Swanst. 24; *Greene v. Greene*, 4 Madd. 148; *Booth v. Blundell*, 1 Meriv. 193. When there is no direction in the will to the contrary, the order of marshalling assets for the payment of debts is as follows: 1. The personal estate. 2. Lands descended. 3. Lands devised. *Livingston v. Newkirk*, 3 Johns. Ch. R. 319. In Kentucky, the assets are marshalled as follows: 1. The general personal estate. 2. Estate specifically devised to be sold. 3. Estate descended. 4. Estate specifically devised, though charged generally with

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the payment of debts. But the second and third exchange places when the estate set apart for the payment of debts is charged generally and not specifically. *McCampbell v. McCampbell*, 5 Litt. 95. See *Stewart v. Executors of Carson*, 1 Desaus. 500.*g*

So it shall be, although such personal debt be also secured by mortgage; and this, whether there be a bond, or covenant for payment, or not.

*Cope v. Cope*, 2 Salk. 449; *Howel v. Price*, 1 P. Wms. 291; *Pockley v. Pockley*, 1 Vern. 36; *King v. King*, 3 P. Wms. 360; *Galton v. Hancock*, 2 Atk. 436; *Robinson v. Gee*, 1 Ves. 251; *Earl of Belvidere v. Rochfort*, 6 Br. P. C. 520; *Philips v. Philips*, 2 Br. Ch. Rep. 273. *β*As between the representatives of the real and personal estate, the land is the primary fund to pay off a mortgage. *Cumberland v. Codrington*, 3 Johns. Ch. R. 252.*g*

So, lands subject to, or devised for payment of debts, shall be liable to discharge such mortgaged lands either descended or devised; (*a*) even though the mortgaged lands be devised expressly *subject to the encumbrance*. (*b*)

(*a*) *Bartholomew v. May*, 1 Atk. 487; *Marchioness of Tweedale v. Earl of Coventry*, 1 Br. Ch. Rep. 240. (*b*) *Serle v. St. Eloy*, 2 P. Wms. 386; *β**Dandridge v. Minge*, 4 Rand. 397.*g*

So, lands descended shall exonerate mortgaged lands devised.

*Galton v. Hancock*, 2 Atk. 424; *Manning v. Spooner*, 3 Ves. 114; *β**Livingston v. Livingston*, 3 Johns. Ch. R. 158.*g* || Though, generally, a descended estate shall be applied in exoneration of a devised estate, yet, under a charge for payment of debts, it shall not be so, if the devised estate be expressly pointed out in aid of another fund provided for that purpose. *Donne v. Lewis*, 2 Br. Ch. Rep. 257. ||

So, *unencumbered* lands and *mortgaged* lands both being specifically devised, (but expressly, "after payment of all debts,") shall contribute to the discharge of the mortgage.

*Carter v. Barnardiston*, 1 P. Wms. 505, and 2 Br. P. C. 1.

But in all these cases, the debt being considered as the *personal* debt of the testator himself, the charge on the real estate is merely collateral. The rule therefore is otherwise, where the charge is on the *real* estate principally, although there be a collateral personal security; (*c*) or, where the debt (although personal in its creation) was contracted originally by another. (*d*)

(*c*) *Countess of Coventry v. Earl of Coventry*, 2 P. Wms. 222; *Edwards v. Freeman*, Ibid. 437; *Wilson v. Earl of Darlington*, 2 Cox's P. Wms. 664, note; *Ward v. Lord Dudley*, 2 Br. Ch. Rep. 316. (*d*) *Cope v. Cope*, 2 Salk. 449; *Bagot v. Oughton*, 1 P. Wms. 347; *Leman v. Newnham*, 1 Ves. 51; *Robinson v. Gee*, Ibid. 251; *Parsons v. Freeman*, Anbl. 115; *Lacam v. Mertins*, 1 Ves. 312; *Perkyns v. Baynham*, 2 Cox's P. Wms. 664, note; *Shafto v. Shafto*, Ibid.; *Bassett v. Percival*, Ibid.; *Lawson v. Hudson*, 1 Br. Ch. Rep. 58; *Earl of Tankerville v. Fawcett*, 2 Br. Ch. Rep. 57; *Tweddell v. Tweddell*, Ibid. 101, 152; *Billinghurst v. Walker*, Ibid. 604. See *Barnes v. Crow*, 4 Br. Ch. Rep. 2.

|| The equity to have the personal estate applied in exoneration of the real, subsists only between the heir or devisee and the residuary legatee, and not against creditors or even against specific or general legatees.

*Hamilton v. Worley*, 2 Ves. 65; 4 Br. Ch. Rep. 204, S. C. ||

It is a rule in equity, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund, on which the second has no lien. If therefore a specialty creditor, whose debt is a lien on the real assets, receives satisfaction out of the personal assets, a simple contract creditor shall stand in the place of the specialty creditor against the real assets, *so far* as the latter shall have exhausted the personal assets in payment of his debt; and legatees (*e*) shall have the same equity as against assets descended.

*Laury v. Duke of Athol*, 2 Atk. 446; *Lacam v. Martins*, 1 Ves. 312. *Mogg v.*

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Hodges, 2 Ves. 53; Trimmer v. Bayne, 9 Ves. 209. (e) Anon. 2 Ch. Ca. 4; Sagittary v. Hyde, 1 Vern. 455; Neave v. Alderton, 1 Eq. Ca. Abr. 144; Wilson v. Fielding, 2 Vern. 763; Galton v. Hancock, 2 Atk. 436; Culpepper v. Aston, 2 Ch. Ca. 117; Bowdman v. Reeve, Pre. Ch. 578; Tipping v. Tipping, 1 P. Wms. 730; Lucy v. Gardiner, Bunb. 137; Lutkins v. Leigh, Ca. temp. Talb. 54. {But the assets will not be marshalled in their favour when the real estate is devised, and not charged with the debts, and the personal estate is sufficient to pay all the debts, though not the legacies in full. 5 Ves. J. 359, Keeling v. Brown.}

So, where lands are subjected to the payment of *all* debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of personal assets.

Halsewood v. Pope, 3 P. Wms. 323.

So, where legacies by will are charged on the real estate, but not the legacies by codicil, the former shall resort to the real assets upon a deficiency of the personal assets to pay the whole.

Hyde v. Hyde, 3 Ch. Rep. 83; Masters v. Masters, 1 P. Wms. 422; Bligh v. Earl of Darinley, 2 P. Wms. 620. || In Masters v. Masters, the real estate was charged by the will with the payment of the legacies *above mentioned*, and therefore it was holden it could not extend to the legacies in the codicil. It would have been otherwise if the charge had been with the payment of the legacies in general. But see Norman v. Morrell, 4 Ves. 1769.||

But from the principles of these rules it is clear that they cannot be applied in aid of one claimant so as to defeat the claim of another, and therefore a pecuniary legatee shall not stand in the place of a *specialty creditor*, as against land devised, (though he shall as against land descended:) but such legatee (a) shall stand in the place of a mortgagee who has exhausted the personal assets, to be satisfied out of the mortgaged premises, though specifically devised; for the application (b) of the personal assets, in case of the real estate mortgaged, does not take place to the defeating of any legacy.

Clifton v. Burt, 1 P. Wms. 678; Halsewood v. Pope, 3 P. Wms. 324; Scott v. Scott, Ambl. 383. (a) Lutkins v. Leigh, Ca. temp. Talb. 53; Forrester v. Lord Leigh, Ambl. 171. (b) Oneal v. Mead, 1 P. Wms. 693; Tipping v. Tipping, Ibid. 730; Davis v. Gardiner, 2 P. Wms. 190; Rider v. Wager, Ibid. 335.

But none of the rules deducible from these cases subject any fund to a claim to which it was not before subject, but only take care that the *election* of one claimant shall not prejudice the claims of the others.

2 Atk. 438; 1 Ves. 312; Robinson v. Tonge, 2 Cox's P. Wms. 680, note. || This case of Robinson v. Tonge, in which it was holden, that assets should not be marshalled as against a copyhold estate, has been overruled by Lord Eldon, Aldrich v. Cooper, 8 Ves. 382, as irreconcilable with all principle. So too in Tomlinson v. Ladbroke, at the rolls' sittings after Hil. T. 1809; Toll. Exec. 422, note (i).||

A court of equity will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal chattels, it being void so far as it touches any interest in lands.

Arnold v. Chapman, 1 Ves. 110; Mogg v. Hodges, 2 Ves. 52; Attorney-General v. Tyndal, Ambl. 614; Makeham v. Hooper, 4 Br. Ch. Rep. 153; Foster v. Blagden, Ambl. 704; Hillyard v. Taylor, Ibid. 713; 2 Eden, 207, S. C.

|| A court of equity cannot marshal assets against judgment creditors, for they are to be paid in the first instance.

Sharpe v. Ld. Scarborough, 4 Ves. 538.

β Where an annuity is secured by a covenant and warrant of attorney, and all the arrears have been paid, the court will not restrain the executors of the grantor from paying his simple contract debts, until they have set



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apart a fund to answer the future payments, unless a case of past or probable misapplication of assets has been made out.

Read v. Blunt, 5 Sim. 567.*g*

If it appears in any stage of the cause, that creditors by simple contract will be deprived of their debts by specialty creditors going against their fund, the court will of itself, though the bill do not call for it, direct the assets to be marshalled.

Gibbs v. Ougier, 12 Ves. 413. *β*An executor is not justified in paying simple contract debts, after notice of debt by specialty. Webster v. Hammond, 3 Har. & M'Il. 131; Brown v. Lene, 2 Hayw. 159.*g*

Under a devise of real and personal estate in trust to pay debts and legacies, some of which were void under the statute of 9 G. 2, c. 36, as a charge of charity legacies upon the real and leasehold estates, and money on mortgage; on a deficiency of assets, the other legatees were preferred to the heir.

Currie v. Pye, 17 Ves. 402.∥

Where a legacy is given out of a mixed fund of real and personal estate payable at a future day, and the legatee dies before the day of payment; *quere*, Whether the court will marshal the assets so as to turn such a legacy upon the personal estate, in which case it would be vested and transmissible; whereas as against the real estate it would sink by the death of the legatee?

Prowse v. Abingdon, 1 Atk. 482; Pearce v. Taylor, Tr. Vac. 1790, before Ld. Thurlow; Kiernan v. Fitzsimon, 3 Ridgw. P. C. 16. ∥ If a testator in his will order his trustees to possess themselves of his estates and *substance*, and to pay debts, this is a charge the real estate, and the assets shall be marshalled to let in the legatees so far as the personal estate has paid towards the debts. Foster v. Cook, 3 Br. Ch. Rep. 347.∥

As against real assets *descended*, it seems, that the wife shall stand in the place of creditors for the amount of her *paraphernalia*. But as against real assets devised, (*a*) *quere*.

Tipping v. Tipping, 1 P. Wms. 730; Snelson v. Corbet, 3 Atk. 369; Graham v. Londonderry, Ibid. 393. (*a*) Probert v. Clifford, 2 Cox's P. Wms. 544, note, and Amb. 6; Ingleton v. Northcote, 3 Atk. 438; Aldrich v. Cooper, 8 Ves. 397.

*β*Testator's private debts are first to be paid out of his private estate, and his copartnership debts out of his copartnership funds.

Hall v. Hall, 2 M'Cord, Ch. R. 302; Ridgeley v. Carey, 4 Har. & M'Hen. 167.

The assets received by a foreign executor or administrator where the testator resided, are to be administered in that state.

Fay, Judge, &c., v. Haven, 3 Mete. 109.*g*

In order to exonerate the personal estate from the payment of debts, the will must contain express words for that purpose, or a clear manifested intention; a declaration plain, or a necessary inference, tantamount to express words. The intention need not be so manifested as that all persons must necessarily agree in it, but so as to convince the mind of the judge deciding the question.

Bootle v. Blundell, 1 Meriv. R. 193; 19 Ves. 494; Greene v. Greene, 4 Madd. R. 148; Gittins v. Steele, 1 Swanst. 24; Tower v. Lord Rous, 18 Ves. 132.

A final decree upon a sum ascertained is equal to a judgment at law; but a mere decree for an account of plaintiff's demand, and of the personal estate come to the hands of the defendant, with a mere direction

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for payment out of the result of that account, does not prevent the executor paying debts; there must be a report and a final decree upon it.

*Perry v. Philips*, 10 Ves. 34; and see *Morrice v. Bank of England*, Ca. temp. Talb. 217; 3 P. Will. 402; 4 Bro. P. C. 287; *Smith v. Eyles*, 2 Atk. 385; *Martin v. Martin*, 1 Ves. 211.

A judgment in the lord mayor's court, obtained against the garnishee, does not entitle the plaintiff to rank as a specialty creditor in the administration of the garnishee's assets.

*Holt v. Murray*, 1 Sim. 485.

The year allowed to executors and administrators for payment of legacies, is only for convenience, and does not prevent the vesting of the fund.

*Gartshore v. Chalie*, 10 Ves. 13.

An executor who has paid legacies cannot allege that debts are outstanding.

*Freeman v. Fairlie*, 3 Meriv. R. 38.

It seems that a surety who pays off a specialty debt is considered a specialty creditor of his principal.

*Robinson v. Wilson*, 2 Madd. 434.

It is a principle in marshalling assets, that where a creditor has two funds, he shall not, by his option to resort to one, defeat persons who have only that one fund to look to; and if he do, those persons shall stand in his place. Upon this principle, a vendor's lien on an estate sold to a deceased person has been extended to the benefit of the persons entitled to the personalty against the heir claiming to have the estate paid for out of the personalty.

*Trimmer v. Baynes*, 9 Ves. 209; and see *Ambler*, 614.

The bond of a married woman, given for a debt contracted during coverture, being a nullity, shall have no priority in the marshalling her separate assets after her decease.

*Anon.* 18 Ves. 258.

Where there are sufficient assets to pay all debts, executors may pay simple contract debts not bearing interest before specialty debts bearing interest, unless specialty creditors complain; the legatees cannot complain.

*Turner v. Turner*, 1 Jac. & W. 39.

In the administration of assets, ordinarily the first fund applicable is the personal estate not specifically bequeathed; then land devised or ordered to be sold for payment of debts not merely charged; then descended estates; then lands charged with the debts; and the distinction is between a mere charge upon the real estates, and proposing the mode in which debts are to be paid.

*Harmood v. Oglander*, 8 Ves. 125; and see 2 Bro. C. C. 257; 12 Ves. 154.

In order to prevent abuse by executors procuring a creditor to institute a suit, whereby, on decree, they were protected from any suit by other creditors, and could thus retain assets, Lord Eldon introduced the rule, that where the executor's answer did not set forth what the assets were, the executor should state them by affidavit; and then an injunction should be granted against any creditor suing, upon the executor's bringing the assets into court to be disposed of as the court should direct.

*Gilpin v. Lady Southampton*, 18 Ves. 469; and see *Paxton v. Douglas*, 8 Ves. 520.

If a suit be commenced for administration of the estate, it is the duty of the executors, by putting in their answers speedily, to facilitate the obtaining a decree, under which the estate may be protected from actions. And

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where creditors are proceeding at law after a decree, the executor should move to restrain them, or he may become responsible.

Clarke v. Ormonde, Jacob's R. 108; Ibid. 122.

Executor or administrator, after suit for an account, may pay simple contract or specialty debts.

Maltby v. Russell, 2 Sim. & Stu. 227.

Where an executor pleaded, to an action by a creditor on a bond of the testator, first, *non est factum*; secondly, *plene administravit*, and a verdict was found for the plaintiff on both pleas, Lord Eldon refused to stay an execution on the judgment by injunction, on the ground that the court could not interfere where the executor had, by pleading, rendered himself liable to a judgment *de bonis propriis*.

Terrewest v. Featherley, 2 Meriv. R. 480.

But in a subsequent case (not distinguishable as to the judgment to which the plaintiff at law was entitled) his lordship granted the injunction on the executor paying the plaintiff's costs at law; saying he was not sure he had not a wrong notion in the former case.

Brooke v. Skinner, Ibid. *in notis*; Lord v. Wormleighton, Jac. R. 148; and see Dyer v. Kearsley, 2 Meriv. 482, n., where a like order was made where the executor had suffered judgment by default at law. It is to be observed, that in neither of the two former cases had the executor rendered himself liable to the debt *de bonis propriis*, but only to the costs, since it is only where he pleads *ne unques* executor, or a release to himself, which he *must know* to be false pleas, that he is liable to a judgment for debt and costs, *de bonis testatoris*, si, &c., *et si non*, &c., *de bonis propriis*, see 1 Will. Saund. R. 336 b, (edit. Patteson,) and the cases there cited. *Ante Executors* (M), p. 526.

It is the duty of an executor, as far as possible, to preserve articles specifically bequeathed according to the testator's wish; and unless compelled, they ought not to apply them to payment of debts.

Clarke v. Ormonde, 1 Jac. 108.

Where the vendor of an estate would have absorbed the personal assets in payment of his purchase-money, a rateable contribution was decreed, as between the devisee of the estate and the legatees and annuitants under the purchaser's will.

Headley v. Readhead, Coop. 50.

Where a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety, if he pays the bond, has a right to stand in place of the mortgagee.

Copis v. Middleton, 1 Turn. & Russ. 231.

A person mortgaged freehold estates, and two months afterwards he surrendered copyholds to the use of the mortgagee to secure the same debt. In a suit after the death of the mortgagor, for the administration of his assets, the freeholds were sold with consent of the mortgagee, and the personal estate having been exhausted, the mortgage debt was, by order of the court, satisfied out of the proceeds of the freeholds; it was held, that the specialty creditors of the mortgagor were entitled to stand in the place of the mortgagee against the copyholds, to the extent of the sum which the mortgagee had received from the freehold estate.

Gwynne v. Edwards, 2 Russell, 289.||

(M) In what Cases an Executor may make himself liable *de bonis propriis*: And herein.

1. Where he shall be liable *de bonis propriis* for his false Pleading.

EXECUTORS are no farther chargeable than they have assets unless they

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make themselves so by their (a) own act; as by pleading a false plea, *i. e.* such a plea as will be a perpetual bar to the plaintiff, and which of their own knowledge they know to be false.

Ro. Abr. 930; Godolph. 198; 1 Bl. Rep. 400. (a) If an executor suffer judgment to go against him by default, upon executing a writ of inquiry, he shall not give evidence of want of assets, for he is estopped, as if it had been the case of an heir; for he should have pleaded *plenè administravit*, or specially what assets he had. 6 Mod. 308, *per Curiam*; Sir W. Jones, 87. That if an executor confesses or suffers judgment by default, he admits assets in his hands, and is estopped to say the contrary. [Rock v. Leighton, 1 Salk. 310; 1 Ld. Raym. 589, S. C.; Com. Rep. 87, S. C.; 3 T. R. 690, S. C.; Skelton v. Howling, 1 Wils. 258, S. P. So, if he pleads only the general issue, and has a verdict against him. Ramsden v. Jackson, 1 Atk. 292; Erving v. Peters, 3 T. R. 685. For he can never avail himself of matters in a subsequent stage of the proceedings, which he might have pleaded in an earlier stage. Earle v. Hinton, 2 Str. 732, and cases *supr.* In *assumpsit* against an executor, he pleaded *non assumpsit* and *plenè administravit*; it was insisted, that if the plaintiff could prove assets unadministered, to any amount, he must have judgment for the whole. But Lord Mansfield said, the law had been understood to be so, and many cases decided to that effect; but that he thought it absurd and wrong, that the plaintiff should recover of the executor *more than the assets in his hands*; and the judgment was given accordingly. Harrison v. Beebles, Guildh. Tr. 1769, cited by Lord Kenyon, 3 T. R. 688.]  $\beta$  The plea of *plenè administravit* may be admitted at any time, if by its admission the trial be not delayed. Wilcox v. —, 1 Hayw. 484. That plea has been allowed after the general issue. Sawyer v. Sexton, 1 Tayl. 137. *g* An executor must defend himself by legal pleading, and cannot in these cases have any relief in equity. [Thus, where to three several actions an executor pleaded that he had no assets *ultra* 100*l.*, and judgment was had upon each action for 100*l.*, equity refused an injunction. Anon. 1 Vern. 119. So, where he had pleaded a false plea, by the mistake of his attorney, as alleged, and a verdict had passed against him, equity would not relieve him, though the merits had never been tried. Stephenson v. Wilson, 2 Vern. 325. However, in the case of Robinson v. Bell, 2 Vern. 146, where the attorney had, by mistake, pleaded a different plea from that which he was directed to plead, and the executor had confessed a mortgage to the testator, which afterwards turned out to be worth nothing, upon which confession a verdict had been given against him, the court thought fit to relieve. And in that case Lord Commissioner Hutchins mentioned two instances where the court had interposed in behalf of executors after verdicts on *ne unques executor*. Under the circumstances of the anonymous case above cited from 1 Vern. 119, the executor may now defend himself at law, without resorting to equity, by pleading to one action *plenè administravit præter* a certain sum, and afterwards to the others, though brought in the same term, the like plea of *plenè administravit præter* the same sum, and as to that sum that he had confessed it in the other action. Waters v. Ogden, Dougl. 452.]  $\beta$  See Roberts v. Wood, 3 Dowl. P. C. 797. *g*

Therefore if an executor, being sued, pleads *ne unques executor*, and it is (b) found against him, the judgment shall be *de bonis testatoris si, &c., et si* (c) *non, de bonis* (d) *propriis*; for thereby he estranged himself from the testator, and the benefit of the will, and by his own falsity and folly hath made his own goods chargeable.

46 E. 3; 10 Ro. Abr. 930, 933; Cro. Ja. 191, 671; Leon. 67; And. 150. (b) If, upon a false plea, judgment be given against an executor upon demurrer, and execution be awarded, the sheriff cannot return *nulla habet bona testatoris*, but is to return a *devastavit*, as if it had been found against the executor by verdict. Cro. Eliz. 102. (c) But, if there had been judgment against the testator, and the party who recovered had brought a *seire facias* on the judgment against the executor; in this case, though the executor had pleaded *ne unques executor*, and it had been found against him, yet he shall be chargeable *de bonis testatoris* only; for the prayer of the writ is for execution of the goods of the testator, by which he is estopped to demand any other. Ro. Abr. 933; Waldron v. Berrie. (d) As well of the debt as of the damages and costs. Ro. Abr. 950.

So, if to an action brought against him he pleads a release made to himself, and it is found against him, this shall charge him *de bonis propriis*; for it is a falsity which (e) falls within his own knowledge.

Cro. Ja. 671, 672. (e) Where the executor pleaded, that he performed a condition,

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which being found against him, it was holden, that he should be charged *de bonis propriis*. Moor, 69, *per* Dyer.

So, where an action of debt upon an obligation was brought against an administrator for 14*l.*, and he pleaded, that before notice of the action his administration was revoked; and that likewise before notice he delivered over 200*l.*, which he had of the intestate's, to the new administrator; the plaintiff replied, that the revocation was by (a) covin and fraud, which being found for him, it was holden, that he should recover absolutely from the administrator.

Yelv. 219, Morgan v. Sock; Blust. 187, S. C. (a) But, where to an action of debt against an executor he pleaded a former judgment had against him by another person, and that he had not assets more than sufficient to satisfy the judgment; and the plaintiff replied, that this judgment was had by covin, to defraud the other creditors; though it be found accordingly, and though this be a false plea; yet the judgment against the executor shall only be *de bonis testatoris*. Ro. Abr. 931; Borret v. Boys. [*Sed quid de hoc?*] β An administrator of an estate represented insolvent, who assumes the defence of an action pending against his intestate, and neglects to suggest the insolvency on record, and prays a stay of execution, so that execution is issued, and returned *nulla bona*, it is waste, and he is liable *de bonis propriis*. Sturgis v. Read, 2 Greenl. 109*g*.

But, if an executor pleads, that such a deed is not the deed of his testator, or that a release was given to the testator; though these prove false, yet the judgment shall be *de bonis testatoris*; for of these the executor cannot be presumed to have so perfect a knowledge.

Ro. Abr. 931; Cro. Ja. 672. [If an executor pleads a former judgment had against him by another person, and no assets *ultra*, and the plaintiff reply *per fraudem*, and it be so found, yet shall the judgment be only *de bonis testatoris*. Bull. N. P. 144.]

So, in debt upon a bond against baron and feme as administratrix, the defendant pleaded payment by the feme, after the death of intestate, and it was found against him, and the judgment was, *quod recuperet* against them *de bonis testatoris, si tantum habent in manibus, et si non, promissis de bonis (b) propriis*, and held well enough; for though the plea is false, yet the husband was a stranger to the intestate, and might not know whether the wife had paid it to the plaintiff or not.

Cro. Ja. 191, Johns v. Adams. (b) It was objected, that the judgment ought to have been *de bonis propriis* of the baron only, for that a feme covert cannot have any goods; but disallowed; for although a feme covert hath not any goods during the coverture, yet because the baron is charged only in respect of the feme, she might have goods if she had survived, and execution might be taken against her. Cro. Ja. 191, 192; but for this vide Ro. Abr. 930, 931; Cro. Car. 693.\*—\*If there be judgment against the husband and wife, executrix, and a return that the husband wasted, it shall be *de bonis suis propriis*. 1 Ro. 932, l. 25.—If a return be that the wife *dum sola* wasted, it shall be *de bonis propriis* of both. 1 Ro. 931, l. 5; R. Cro. Car. 519. See also 1 Ro. 930, l. 50.—If it be returned against a *feme covert*, executrix, and her husband, that sufficient goods have come to their hands, which they have wasted and *converted to their own use*, it is good; the conversion is not necessary, and may be rejected; and judgment shall be *de bonis propriis* of both. Bellow v. Scott, 1 Str. 440; Morfoot v. Chivers, *Ibid.* 631, S. P.; Smalley v. Kerfoot, 2 Str. 1094, S. P.

So, if an action of covenant be brought against an executor, and the breach assigned be in the time of the executor; yet the judgment shall be *de bonis testatoris*; for it is the testator's covenant which binds the executor, as representing him, and therefore he must be sued by that name.

Hob. 188; Cro. Ja. 647, 671; Hut. 35; Brownl. 24; Ro. Abr. 931, 932; Saund. 112.

|| According to the modern cases the executor defendant will be entitled to the general costs, though he may have pleaded the general issue and failed on it, provided he has pleaded any one plea which goes to the whole cause of action, and succeeded on it.

Hogg v. Graham, 4 Taunt. 135; Edwards v. Bethel, 1 Barn. & A. 254; Ragg v. Wells, 8 Taunt. 129; and see Hindsley v. Russell, 12 East, 232.

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If an executor pleads *non assumpsit* and *plenè administravit*, and the first plea is found for the plaintiff, who takes judgment of assets *quando* as to the second, the plaintiff is entitled to judgment *de bonis propriis* for the costs, if there are not assets to satisfy them.

Marshall v. Willder, 9 Barn. & C. 655.||

It is holden in Shipley's case, that if an action of debt on an obligation of 200*l.*, be brought against an executor, who pleads fully administered; and the plaintiff replies assets, which are found by the jury to the value of 172*l.*, that a judgment to recover the entire debt and damages, and costs of the goods of the testator, *si, &c., et si non, tunc* the damages of his (a) proper goods, is goods; for that the defendant's bar being in effect, that he had not assets, the same amounted to a (b) confession of the debt, on which the plaintiff may take judgment immediately, though he cannot have execution until assets come to the hands of the executor.

8 Co. 134, Mary Shipley's case; Hob. 199, S. C. cited. (a) That if the executor has not sufficient goods of the testator's to satisfy both debt and damages, the damages must be levied of the goods of the executor for the delay; and the levying of the damages of the goods of the testator, when it appears they are not sufficient to satisfy the debt, is erroneous: for the testator's goods are to be charged with the debt and not the damages, if they are not sufficient to discharge both. Lev. 7. (b) That in an action on the case against an executor, who pleads *plenè administravit*, the plaintiff must prove his debt, otherwise he shall recover but 1*l.* damages, though there be assets; for the plea only admits the debt, but not the quantity. Salk. 296, *per* Holt, Ch. J.

But in the case of Dorchester and Webb it seems to be holden, that the plaintiff, upon a plea of *plenè administravit*, cannot have judgment of assets *in futuro*; for that this is such an acknowledgment of the want of assets, as will bar him in the same manner as if the plaintiff had denied that he had fully administered, which being found against him will bar him, and on which the plaintiff must always pay costs.\*

Cro. Car. 373. βWhen on the issue of *plenè administravit*, the jury find for the plaintiff, they must find specifically the amount of assets in the hands of the executors, otherwise the court cannot render judgment on the verdict. Fairfax's Executors v. Fairfax, 5 Cranch, 19.*g* \*It is common now, on such plea, to admit the truth of it, and take judgment *de bonis quando acciderint*. A plea of *plenè administravit* cannot be withdrawn at the trial for the purpose of pleading *ne unques executor*. The State v. Boone, 1 Har. & Johns. 134.*g* [But after the plaintiff hath taken such judgment, he shall not, in a subsequent action against the executor, suggesting a *devastavit*, be allowed to go into evidence of assets having been in the defendant's hands before that judgment: for by so taking his judgment, he admits that the defendant hath fully administered to that time. Bull. N. P. 169. βM'Dowell v. Branham, 2 Nott & M'Cord, 573; Summers v. Tidmore, 1 M'Cord, 270; Kerley v. West, 3 Litt. 364.*g* In a *scire facias* therefore on the judgment, he must not pay execution of assets generally, but of those only which have come to the executor's hands since the former judgment. Mara v. Quin, 6 T. R. 1. But if the executor receive assets between the time of the plaintiff's suing out the writ in the first action and the judgment, the judgment will be amended by being made a judgment as of that term when the plaintiff could, at the soonest, have entered it up, unless the defendant can show, that in point of fact some injustice will be done by it in the particular case. Ibid.]

But this matter came to be fully considered in the case of Noel and Nelson, where in debt against an executor he pleaded fully administered, whereupon the plaintiff prayed judgment of assets *in futuro*, and it was so entered; and after, upon a suggestion of assets, the plaintiff sued forth a *scire facias*, to which he pleaded no assets, and it was found against him, and judgment accordingly; and it was urged for error, that the plaintiff hereby had confessed the plea of fully administered, and then it was as strong against him as if there had been a verdict, in which he should have been

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barred for ever. But it was resolved for the plaintiff; for he had a good cause of action, and probably did not know but that there were assets, and had done nothing amiss; for as soon as the executor denies assets by his plea, he rests satisfied, and makes only a reasonable prayer, that he may be paid when assets do come, as it is fit he should. And therefore they agreed Shipley's case to be good law; for when the executor pleads *riens en mains*, he confesses the debt, which is a good foundation for the judgment; but the want of assets at present hinders execution, which is therefore stayed till assets shall come.

Lev. 286; 2 Saund. 214; Sid. 448; 2 Keb. 606, 671; Vent. 94, S. C.; *β* On a plea of *plenè administravit prater*, the plaintiff is entitled to a judgment of assets *in futuro* for debts and costs. Cox v. Peacock, 2 Scott, 125; 4 Dowl. P. C. 134; 1 Hodges, 272. See Gardner's Adm'r. v. Vidal, 6 Rand. 106.*g*

*β* *Plenè administravit* is a good plea to a *scire facias* on a judgment against the intestate.

Tanner v. Freeland, 1 Har. & M'H. 34.

Where a judgment had been obtained in Virginia against an executor *de bonis testatoris, et si non de bonis propriis*, and debt was brought upon it in North Carolina, and the defendant pleaded no assets, judgment *de bonis propriis* was given against him.

Anon. v. Person's Executors, 2 Hayw. 301.

The confession of judgment by an executor or administrator, is, in general, an admission of assets to the amount of the judgment. (*a*) But see as to the practice in Pennsylvania. (*b*) When an executor confesses judgments, and gives forthcoming bonds for debts due by his testator, under the belief that the assets are amply sufficient to pay all claims against the estate, but afterwards, by an unexpected depreciation of property, the amount of assets proves inadequate, the executor will be relieved in equity. (*c*)

(*a*) Griffith v. Chew, 8 S. & R. 17; Den v. De Hart, 1 Halst. 450. (*b*) Hussey v. White, 10 S. & R. 346. (*c*) Miller's Executors v. Rice, 1 Rand. 438. See Pickett v. Stewart, 1 Rand. 478.*g*

2. Where by his Promise to pay or discharge the Testator's Debts or Legacies, he makes himself liable.

If an executor, in consideration that a creditor to the testator will forbear to sue him for a certain time, promises to pay him his debt, this shall bind him; and an *assumpsit* lies against him on this promise, (*d*) without alleging that he hath assets.

Cro. Ja. 47; Co. 94; Ro. Abr. 921.—*β* Sleighter v. Harrington, 2 Tayl. R. 249.*g* Note that by the statute of frauds, 29 Car. 2, c. 3, such promise must be in writing. (*d*) It is said in 9 Co. 94 a, that though the plaintiff need not allege that the executor has assets, yet, if in truth there be no debt due from the testator, or if the executor had no assets at the time of the promise made, he may give these matters in evidence. But the better opinion seems to be, that the plaintiff need not prove his having assets, and that forbearance is sufficient consideration to entitle him to the action. Vide Ro. Abr. 24; Cro. Ja. 273, 604, 613; 3 Leon. 67; 2 Lev. 20, 122.— But a promise by an administrator *durante minoritate* after the infant has come of age, will not bind such administrator. Cro. Car. 516; Ro. Abr. 910; Vaugh. 93, *supra*, 489. See 38 G. 3, c. 87.

So, in *assumpsit* the plaintiff declared, that J S devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for the legacy, the defendant, in consideration of forbearance, promised to pay him: the defendant pleaded divers bonds and judgments, and *null assets ultra*, upon which the plaintiff demurred, and had judgment without argu-

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ment: for it is not material whether he had assets or no, for he is charged upon his own promise, in consideration of forbearance; and a forbearance of suit for a legacy is a sufficient consideration.

2 Lev. 3; Davis v. Reynier, Vent. 120, S. C. ¶An action of *assumpsit* for a legacy, founded not upon any express assent of the executor, but merely on an implied assent on account of a sufficiency of assets, cannot be supported. Deeks v. Strutt, 5 T. R. 690. But an action may be maintained by the legatee of a specific chattel against an executor, after his assent to the bequest. Doe v. Guz, 3 East, 120; Barton's case, 1 Freem. 289.¶

So, if A, together with B, is bound to C for the proper debt of B, &c., and A pays the money, and B dies and makes D his executor, and D, in consideration that A will forbear to sue him till such a time, assumes and promises to repay him: this consideration is good, though D was liable in equity only.

Sid. 89; Scot v. Stephens, Lev. 71, S. C.; Ro. Rep. 27, S. P. *per* Croke. [Forbearance seems a good consideration for a promise by an executor to pay a debt of his testator. Reece v. Kennegal, 1 Ves. 125.]

βAn administrator has no power of charging the effects in his hands to be administered by any contract originating with himself; his contracts in the course of his administration, or for the debts of his intestate, render him liable *de bonis propriis*.

Summer, adm'r., v. Williams, 8 Mass. 199; Forster v. Fuller, 6 Mass. 58. See Caswell v. Wendall, 4 Mass. 108.

The promise of an executor to pay the testator's debt, when he has no assets, is a mere *nudum pactum*. The extent of the promise is measured by the extent of assets.

Lair v. Miller, 2 Litt. R. 67. See Sleighter v. Harrington, N. C. Term. R. 249; S. C. 2 Mur. 332.

By virtue of their general powers, executors cannot make any contract, in their representative character, which, at law, will bind the estate, and authorize a judgment *de bonis testatoris*.

M'Eldery v. M'Kenzie, 2 Porter, 33.

An executor who makes himself personally liable by bond for his testator's debts, and takes no steps to convert the realty into assets, will not be relieved in equity.

Leslie v. Wiley, Wright, 145.

An intestate at his death was indebted to a bank by note under seal; his administrator renewed the note, signing his name thus: "A B, administrator of C D, deceased." The renewed note is an accord and satisfaction of the old note, and the debt became the debt of the administrator.

Erwin v. Carroll, 1 Yerg. 145.*g*

(N) What Actions Executors or Administrators may bring in Right of those they represent.

AN executor stands in the place of his testator, and (a) represents him as to all his personal contracts, and therefore may regularly maintain any action in his right, which he himself might.

Cro. Eliz. 377; Latch. 167; Ro. Abr. 912; Savill, 118, 133; Poph. 189; Leon. 193. βAs a general rule, the executor or administrator possesses the same rights, and no more, than the testator or intestate; but according to a decision made in Pennsylvania, he has greater rights, in some cases, for example, where a person parted with the possession of his property for the purpose of defrauding his creditors, he cannot maintain ~~trover~~ to recover it back; but after death, if his estate be otherwise insufficient to pay



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his debts, the action of trover survives to his representatives, who may prosecute it for the benefit of the creditors. *Stewart v. Kearney*, 6 Watts, 453.*g* (a) But, if one enters into an obligation, conditioned to pay 20*l.* to such person as the testator shall by his last will appoint, and the testator makes no particular appointment, his executors cannot maintain an action for this 20*l.*; for though they are his assignees in law, yet the assignee here must be an assignee in deed, who shall take it to his own use; for the word *paying* carries property with it. *Hob.* 9, 10.

But it seems that executors could not at common law bring trespass for a trespass done to the testator; to remedy which, by the 4 E. 3, c. 7, reciting, That “whereas in times past executors have not had actions for a trespass done to their (a) testators, as of the goods and chattels of the same testators, carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted, That executors in such (b) cases shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be should have had, if they were in life.”

(a) “This act does not speak of actions of trespass, though the instance put is proper for such an action; but it speaks of actions for a trespass done to the testator’s goods, and it enacts, that in such cases executors shall have an *action against the trespassers*; apparently using the word *trespass* as meaning a wrong done generally, and the trespassers as wrong-doers. It does not specify the nature of the action.” *Per* Lord Ellenborough, C. J., in *Wilson v. Knubley*, 7 East, 134. See also the words of Lawrence, J., to the same effect, *Ibid.* So, by Powell, J., 2 Ld. Raym. 974. “This statute is a remedial law, which has always been taken by equity, and whenever there is a matter of property in question, it is brought within the statute.” (b) It hath been adjudged, that an executor may have an action of debt upon the statute 2 & 3 E. 6, c. 13, against a defendant, for not setting out tithes in his testator’s time; for though it is a tort done to his person, yet it is maintainable within the equity of this statute. *Vent.* 30.

¶ And by 25 E. 3, st. 5, c. 5, “Executors of executors shall have actions of debt, accompt, and of goods carried away of the first testator, and execution of statutes merchant, and recognisances made in court of record to the first testator, in the same manner as the first testator should have if he were in life.”

Also it was holden, that at common law there was no remedy for recovery of rent-arrear in the lifetime of the testator; for the heir could not maintain an action of debt for it, because he had nothing to do with the personal contracts of his ancestor; nor the executor, because he could not represent his testator, as to any contracts relating to the freehold and inheritance. But this is remedied by the 32 H. 8, c. 37, by which executors and administrators are enabled to sue for and recover all such arrears of rent, &c., for which *vide* title DEBT, letter (C).

Co. Lit. 162, 2.

¶ By 11 G. 2, c. 19, § 15, (which see, tit. RENT, (H),) the executors of tenant for life, on whose death any lease determined, shall, in an action on the case, recover of the lessee a rateable proportion of rent from the last day of payment to the death of such lessor.

The provisions of this statute have, by an equitable construction, been extended to the case of tenants in tail, whose leases are determined by their death. *Vide infra*, tit. RENT, (H).¶

Executors and administrators may bring trover for the goods of the deceased, though the defendant took the goods before probate or administration committed; for the probate and administration relate back to the death of the testator or intestate; and they may allege the possession in the testator or intestate; for though this be a possessory action, yet the

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law supposes the possession in the executor or administrator, as soon as the property is derived to them.

Cro. Eliz. 377; Vent. 30.  $\beta$ Fraser v. Swansea Canal Company, 1 Adol. & Ell. 354; 3 Nev. & M. 391; Kirby v. Clark, 1 Root, 389. An administrator may maintain trover against a stranger, for the conversion of a title deed of the plaintiff's intestate, which took place during the life of the intestate. Towle v. Lovett, 6 Mass. 394.*g* Vide tit. *Trover and Conversion*.

An executor, (and not heir or assignee,) for a covenant broken in the lifetime of the testator, shall have an action of covenant, though it were a covenant real, which runs with the land, as he cannot of that have an heir, &c., and the damages shall be recovered by the executor, though not named, as he personally represents the testator.

2 Lev. 26; Vent. 175, S. C. That executors shall take advantage of covenants in gross. Palm. 558.—But covenants annexed to the freehold and inheritance, though made with the testator, his executors and administrators, shall descend to the heir. And. 55; Skin. 305, pl. 1. Vide title *Covenant*.

But though an executor represents the testator as to his personal estate and contracts only, yet an executor may bring an ejectment for an ejectment in the life of the testator; for in this action damages as well as the possession of the lands are to be recovered.*(a)*

Vent. 30; 1 And. 242; 1 Leon. 205, S. P. *arguendo*. So 7 II. 4, 6 b; Br. Abr. tit. *Executors*, 45, S. C. *(a)* So he may bring a *quare impedit* for a disturbance in the lifetime of the testator, and shall recover damages within the equity of the statute 4 E. 3, c. 7; Cro. Eliz. 207; 1 And. 241, S. C.; 1 Leon. 205, S. C.; 4 Leon. 15, S. C.

So, if a lord of a manor assesses a fine upon a copyholder for his admittance, and dies, his executor may bring an action for it; for it does not depend upon the inheritance, but is *quasi* a fruit fallen.

Carth. 90, Shuttleworth and Garret; 3 Mod. 239; 3 Lev. 261; Show. 35; Comb. 151, S. C., adjudged by three judges against Holt, C. J.; Ld. Raym. 502. [Evelyn v. Chichester, 3 Burr. 1717, *acc.*]

An executor may bring a writ of error to reverse an attainder of high treason of his testator; for he is privy to the judgment, and may have a loss thereby.

Salk. 295, King v. Ayloff, by three judges against Holt, who held, that by the reversal the blood and land is restored, which is no advantage to him, and the goods were forfeited by the conviction of the testator, and not by the attainder. Vide 4 Bl. Comm. 387.

[So the executor of a tenant from year to year as long as both parties please, may maintain an ejectment, for it is a chattel interest which vests in him.

Doe v. Porter, 3 T. Rep. 13.]

|| An administrator cannot have any action for a breach of promise of marriage to the intestate, where no special damage is alleged to have been sustained; for this case falls within the rule *actio personalis moritur cum personâ*.

Chamberlain v. Williamson, 2 Maule & S. 408.  $\beta$ An action does not lie against an executor for a breach of promise of his testator, without special damages. 13 S. & R. 183; 1 Pick. 71.*g*

An executor or administrator cannot sue for breach of a covenant that the covenantor was seised in fee, and had good right to convey, without showing some special damage accrued to the testator in his lifetime by

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breach of the covenant, or that the executor or administrator has some interest in the premises.(a)

Kingdom v. Nottle, 1 Maule & S. 355. (a) The devisee of the land afterwards sued on the covenant and succeeded. S. C. 4 Maule & S. 53.

Nor can he sue on a covenant for further assurance, though the breach were committed in the time of the testator, &c., if the damage accrued only to the heir.

King v. Jones, 1 Marsh R. 107.

Where a bill was endorsed specially to the intestate, who at the time was dead, the property in the bill passed to the administrator, and he was held entitled to sue; and the bill having been accepted after the intestate's death, it was held, that the statute of limitations only began to run from the time of administration; for till that time there was no party in existence who could sue on the bill.

Murray v. East India Company, 5 Barn. & A. 205.

Where an administrator by mistake makes a payment out of the assets which ought not to have been made, he may recover it back in his representative character; and this although such payment may amount to a *devastavit*.

Clark v. Hougham, 2 Barn. & C. 149.||

(O) How such Actions must be laid: And therein of joining a Matter in Right of the Testator, and in their own Right, in the same Action.

AN executor cannot in the same action join a demand in his own right, with one in right of the testator; for the rights being of several natures, there must be several judgments.

Moor, 419; Cro. Eliz. 406; Hob. 184; Noy, 19; Vent. 268; 2 Lev. 110, 111, 228; 2 Keb. 814; 3 Lev. 74; Show. 366; Salk. 10, pl. 1; Carth. 235; [2 Str. 1271; 4 Term Rep. 480; {5 East, 150, Henshall v. Roberts; 2 Bos. & Pul. 424, Bridgen v. Parkes.} [But it is the constant practice to join in the same declaration several counts for money had and received by the defendant to the use of the testator, and to the use of the executor as such. Petrie v. Hannay, 3 Term Rep. 660.] {And if a count for money paid for the defendant by an executrix as such is added to a count on promises to the testator, the judgment will not be reversed. For she may have been sued on the obligation of her testator, (who had become surety for the defendant,) and she may have been obliged to pay the whole debt; to recover which, the law would raise an implied promise by the defendant to her as executrix to repay the money. And if there is any case in which the money may have been paid by her as executrix, the judgment may be sustained. 3 East, 104, Ord v. Fenwick. And a count upon a promise to the plaintiff as administratrix for goods sold and delivered by her after the death of the intestate may be joined with a count upon an account stated with her as administratrix: for the damages and costs when recovered would be assets. 6 East, 405, Cowell v. Watts. But an executor cannot join a count on a bond given to his testator with one on a bond given to himself as executor. 3 Bos. & Pul. 7, Hosier v. Lord Arundel.}

|| The funds too, to which the money and costs, when recovered, are to be applied, or out of which the costs are to be paid, are different; and the damages and costs being entire, it cannot be distinguished how much the plaintiff is to have as executor, and how much he is to take as his own. A count therefore (b) on an *indebitatus assumpsit* to A as administrator cannot be joined with a count on an *insimul computasset* with him in his own name. But a (c) count in *assumpsit* to the plaintiff as executor, for money paid by him to the defendant's use, may be joined with a count on promises made to the testator. So, a count (d) upon a promise to the plaintiff as administrator for goods sold and delivered by him after the death of the intestate, may be joined with a count upon an account stated with him as administrator. For in both these cases the money to be recovered under

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each of the counts will be assets; and the whole being thus applicable to the estate of the testator, the counts may consequently be joined. But it must be averred that the duty accrued to the plaintiff *as executor*; for it is not enough to say that it accrued to him *executor*, or *being executor*. And therefore where (e) a count upon an account stated with the plaintiff executrix (not *as executrix*) was joined with a count on a promise to the testator, it was holden in error after judgment by *nil dicit*, and a writ of inquiry, and final judgment, that those two counts could not be joined.

(b) *Rogers v. Cook*, 1 Salk. 10; *Carth.* 235, S. C.; 1 Show. 366, S. C.; *Hooker v. Quilter*, 1 Wils. 171, S. P.; 2 Str. 1271, S. C. and S. P. (c) *Ord v. Fenwick*, 3 East, 104; *Foxwist v. Tremaine*, 2 Saund. 207. (d) *Cowell v. Watts*, 6 East, 403. So, *Bull v. Palmer*, 2 Lev. 165; *Sir Thos. Jon.* 47, S. C.; *Mason v. Jackson*, 3 Lev. 60; *King v. Thom.* 1 T. R. 489; *Cockerill v. Kynaston*, 4 T. R. 281; *Thompson v. Stent*, 1 Taunt. 322; *Powley v. Newton*, 6 Taunt. 453; 2 Marsh. 147, S. C. (e) *Henshall v. Roberts*, 5 East, 150.

If a bond or promissory note be given to one *as executor*, it has been holden, that he cannot join a count on such bond or note with a count on a debt due, or a promise made to the *testator*.

*Betts v. Mitchell*, 10 Mod. 316; *Hosier v. Lord Arundel*, 3 Bos. & Pull. 7. But in *King v. Thom.* 1 T. R. 487, it was holden by Ashhurst and Buller, Js., that a count against the defendant as acceptor of a bill of exchange endorsed by the payee to the plaintiffs, surviving executors of J S, *in right of the plaintiffs as surviving executors*, might be joined with counts for money had and received by the defendant to the use of the plaintiffs as executors, and on an account stated with the plaintiffs as executors.

So neither can several demands against an executor, some of them accruing in his representative character, and some in his own right, be joined in the same declaration, the pleas and judgments to such demands, and the funds out of which the costs are to come, being different.||

And therefore, if in *assumpsit* against an administratrix, the plaintiff declares upon a sale of goods to the intestate for 200*l.*, and upon another sale to the defendant herself for 27*l.*, and that upon account the defendant was found indebted to the plaintiff in these sums, and promised, &c.; the declaration is naught, for the charge being in several matters, viz., in her own right, and as administratrix, it ought to have been by several actions.

Hob. 88, *Herrenden v. Palmer*.

So, a count for money had and received by the defendant *as executor* for the plaintiff's use, or for money lent to him *as such*, or on an *insimul computassent* of money due to him *as such*, cannot be joined with a count on a promise made by the testator. But a count on an account stated with an executor, *as executor, for money owing from the testator*, may be joined with a count on a promise made by the testator. This indeed is the common way of declaring against executors to save the statute of limitations.

*Jennings v. Newman*, 4 T. R. 347; *Rose v. Bowler*, 1 H. Bl. 108; *Bridgen v. Parkes*, 2 Bos. & Pull. 424; *Secar v. Atkinson*, 1 H. Bl. 102.

To a count in covenant, charging the defendants as executors for breaches of covenant by their testator as lessee, who had covenanted for himself, his executors, administrators, and assigns, may be joined another count, charging them, that after the testator's death, and their proving the will, and during the term, the demised premises came by assignment to one J S, against whom breaches are alleged; and concluding, that so neither the testator, nor the defendants after his death, nor J S since the assignment to him, had kept the said covenant, but had broken the same.

*Wilson v. Wigg*, 10 East, 313.||

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So, if A, B, and C be possessed as joint merchants of goods, which come to the hands of J S, and afterwards B and C die, A alone may bring trover for these goods; for though between joint merchants there is no survivorship, yet the action in this case must survive, though the interest doth not; otherwise there would be a failure of justice, because the survivor and the executors of those who are dead cannot join in action, for that their rights are of several natures, and there must be several judgments.

Kemp v. Andrews, Carth. 170; 1 Show. 188, S. C.; 3 Lev. 290, S. C.; Martin v. Crompe, 1 Ld. Raym. 340; 2 Salk. 444, S. C.

If an executor brings an action of debt for any thing in right of the testator, it must be in the (a) *detinet* only.

5 Co. 32, laid down as a rule. Moor, 566; Ro. Abr. 602, 603, S. P. (a) But, if in the *debet* and *detinet*, it is aided after verdict, by 16 & 17 Car. 2, c. 8. Frevin v. Paynton, 1 Lev. 250; 1 Sid. 379, S. C.

So, if an executor brings debt upon an obligation made to the testator, where the day of payment incurred (b) after the death of the testator, yet the writ shall be in the *detinet* only; for he brings the action as executor.

20 H. 6, 5 b; Ro. Abr. 602, S. C. (b) So, if a man binds himself to the testator to pay him 100l. when such a thing shall happen, if it happens after the death of the testator; yet the writ of debt by the executor shall be in the *detinet* only. Ro. Abr. 602.—So, if a rent be granted to another for years, the executor of the grantee shall have debt, for the arrearages of this rent incurred after the death of the testator in the *detinet* only; for he had it as executor. Ro. Abr. 602.—So, if lessee for twenty years leases for ten years, rendering rent, and dies, his executor or administrator shall have debt for the rent incurred after the death of the testator in the *detinet* only. Ro. Abr. 603; Noy, 32; Cro. Car. 225; Lev. 250; 2 Keb. 407; Sid. 379, S. P. adjudged.—But in Sir T. Jon. 169, the contrary seems to be adjudged, and a diversity taken between things in action and chattels in possession; for as to things in action, the writ must always be in the *detinet*, as for the arrears of an account, &c., and they shall not be assets till recovered; but in this case the reversion of the term being in the executor immediately by the death of the testator, it is assets for the whole value, and the showing he is executor is only to entitle him to the term to which the rent is incident.

So, if in an account an executor recovers a debt due to his testator, in debt for the arrears thereupon, the writ shall be in the *detinet* only; for though the action is converted into a debt by the account, yet it is the same thing which was received in the life of the testator.

Cro. Eliz. 326; 5 Co. 31; Cro. Ja. 545; Hob. 272.

So, if A be in execution upon a judgment for B, and after B die, and A bring an *audita querela* against C the executor of B, and have a *scire facias*, and thereupon put in bail by recognisance in Chancery, according to the statute of 11 H. 6, c. 10; and after upon this *audita querela* judgment be given against A, and afterwards a *scire facias* issue against the bail, and after judgment the bail be taken in execution upon the recognisance, and the sheriff suffer him to escape, upon which escape the executor bring an action of debt; (c) this action ought to be brought in the *detinet* only, and not in the *debet* and *detinet*; for this recognisance is in nature of the first debt, this being in a legal course.

Ro. Abr. 602; Lane, 79. (c) So, if one, as executor, obtains judgment in debt, and takes the defendant in execution, and the sheriff suffers him to escape, &c., for the first action being in the *detinet*, and that for the escape being founded upon the same record, it ought to pursue it. Cro. Eliz. 326; Cro. Ja. 545, 685; Hob. 264; 2 Ro. Rep. 132; Style, 232; Hut. 79; Carth. 49. But *contra* Bonafous v. Walker, 2 T. R. 128; Crawford v. Whittall, Dougl. 5, n.

But, if an executor takes an (d) obligation for a debt due to his testator

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by contract, in debt upon this obligation the writ shall be in the *debet* and *detinet*.

Ro. Abr. 602. *β*Urquhart's Executor v. Taylor, 5 Mart, Lo. Rep. 201.*g* (*d*) So, if the executor sells the goods of the testator for a certain sum, he shall have debt for this in the *debet* and *detinet*. Lane, 80. So, if an executor recovers in trespass for goods taken out of his possession, in debt for the damages recovered, the writ shall be in the *debet* and *detinet*, for he need not name himself executor. Ro. Abr. 602; Lane, 80. *β*After the recovery of a judgment by an administrator, in a suit on that judgment, it is not necessary that he shall sue as administrator, the debt and the judgment being due to him personally. Biddle, Adm'r., v. Wilkins, 1 Pet. 686. In a suit arising upon contract, or for a tort committed after the death of the testator, it is not requisite that the executor should declare in his official capacity. Carlisle v. Burley, 3 Greenl. 250; Ayres v. Toland, 7 Har. & Johns. 3.*g*

So, if an executor, having lands by an extent, upon a statute made to the testator, and naming himself executor, by deed leases them for three years, rendering rent, &c., if an action of debt is after brought by him for this rent, it must be in the *debet* and *detinet*, because it is founded upon his own contract.

Cro. Ja. 685; Winch. 80; S. C. Mod. 185, S. P.

So, an executor, being lessee for years of a rectory in the right of the testator, may have debt upon 2 & 3 E. 6, c. 13, for not setting out tithes in the *debet* and *detinet*, because founded upon a wrong in his own time; and by the statute it is given to the party grieved.

Cro. Ja. 545.

Also, executors and administrators may, if they were actually possessed of the goods of the deceased, declare that they were possessed as of their own goods and chattels, without naming themselves executors or administrators, because the violation is to the property actually in their own hands.

6 Mod. 92; *β*Trask v. Donaghue, 1 Aik. 370.*g* [So, in an action on a judgment obtained by them. Crawford v. Whittal, Dougl. 4, note; Bonafaus v. Walker, 2 T. R. 128. But, where the goods of the testator never were in the possession of the executors, they must declare in that character. And if the goods when recovered will be assets in their hands, they must sue for them in that character, whether the conversion happen before or after the testator's death. Cockerill v. Kynaston, 4 T. R. 281.] [See 7 Term, 358, Bollard v. Spencer; 3 East, 104, Ord v. Fenwick; 5 East, 150, Henshall v. Roberts; 6 East, 405, Cowell v. Watts; 3 Bos. & Pul. 7, Hosier v. Lord Arundel.]

[So, where executors pay money which they were not obliged to pay, and afterwards bring an action to recover it back, they must declare in their own right, and not as executors.

Munt v. Stokes, 4 T. R. 565.

If a bill of exchange be endorsed to A and B as executors, they may declare as such in an action on the bill against the acceptor.

King v. Thom, 1 T. R. 487.]

{An executor may recover in his own name money due to the testator in his lifetime, and received after his death by the defendant. The cause of action arises in the executor's own time, and never did arise to the testator.

Willes, 103, Shipman v. Thompson.}

It was formerly(*a*) holden, that an administrator in his declaration ought to show how he was administrator, and likewise to produce his letters of administration: also, it was(*b*) holden, that in action against an administrator, the plaintiff ought to show by(*c*) whom administration was granted.

(*a*) 44 E. 3, 16; 35 H. 6, 31. (*b*) Cro. Ja. 10, Wade v. Atkinson. (*c*) That an

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administrator, in his declaration, was likewise to show in what place administration was committed to him. 25 H. 6, 31.—But this was ruled otherwise. Cro. Eliz. 283, Piers v. Turner.

But afterwards this difference was taken, that where an administrator is plaintiff, he must show by whom administration was granted to him, because it is that which entitles him to the action; and if granted by a (a) peculiar jurisdiction, ought not only to show by whom, but must add this clause, *cui commissio administrationis prædict. de jure pertinuit*, which he need not do if the administration was granted by a bishop; for in such case it is sufficient to say, that it was granted to him by the bishop, *loci illius ordinarium*, because since the law takes notice of the general jurisdiction of a bishop over the whole diocese, it likewise takes notice of all acts done by virtue of that jurisdiction.

Cro. Eliz. 838, 879, 907; Style, 106. (a) Where administration was granted by an archbishop, and not said, whether as ordinary, or by virtue of his prerogative, yet held good. Cro. Eliz. 6, 907; 4 Leon. 189.—Where the administrator set forth, that administration was committed to him by J S, archdeacon of Norfolk, and did not say *loci istius ordinarium*; it was holden good on a general demurrer; for it is not necessary to show the jurisdiction of an archdeacon more than of a bishop. Sid. 302; Lev. 192.—That the plaintiff need not set forth the authority of an archdeacon, because he is *oculus episcopi*, and is to commit administration *de jure ordinario*. 2 Ro. Rep. 124, 150; Cro. Ja. 556; Palm. 97; Style, 54, but for this vide Cro. Eliz. 431; Moor, 367; Leon. 312; Style, 236, 282; Jon. 1; 2 Mod. 65; Lutw. 9, 408.—And that such an omission will be aided after verdict. Show. 355; Mason and Hanson adjudged, 4 Mod. 133, S. C.; 2 Ld. Raym. 1037.

But, where the plaintiff sues the defendant as administrator, he need not now set forth in his declaration by whom administration was committed, for it may not be in his knowledge; and therefore it hath been holden sufficient for him to declare, that administration was granted to the defendant *debitâ juris formâ*, without showing by what ordinary; (b) but it is said to be necessary for him to allege, that administration was granted to him in order to charge him in the action.

Lit. Rep. 80; Style, 282, 463; Sid. 228; Jon. 1; Lutw. 301. (b) In 2 Vent. 84, it is said, that the plaintiff in his declaration must aver, that the administration was committed to the defendant. But in Comb. 465, a case is cited to have been adjudged, Mich. 1698, that though such an omission be ill upon a demurrer, yet it is aided by the defendant's pleading over, whereby he admits himself a rightful and lawful administrator. [It is sufficient to state that the defendant is administrator. Holiday v. Fletcher, 2 Ld. Raym. 1510; 2 Str. 781, S. C.; 1 Barnard. 29, S. C.; Wade v. Wadman, Barnes, 167.]

{The endorsee of a note payable to the intestate, and endorsed by the administrator as such, need not in his declaration make a profert of the letters of administration, because they cannot be supposed to be in his custody or power. But on trial he must produce them in evidence, as they are the title under which he claims, and he must show that they were granted by a court or person having lawful authority.

Willes, 559, Stone v. Rawlinson.}

Also, it was formerly holden absolutely necessary, that executors and administrators should (c) conclude their declarations with a *profert hic in curia literas testamentarias* or *literas administrationis*, because these were the things which entitiled them to the action.

Cro. Eliz. 551, 592; Cro. Ja. 299, 409; Bulst. 200; 3 Bulst. 223; Hob. 38. βLetters of administration are not demandable after issue joined. Berry v. Pullen, 1 Hayw. 16; Executors of — v. Oldham, 1 Hayw. 165. γ (c) That in a *scire facias* by an executor upon a judgment obtained by the testator, the *profert in curia*, &c., may be in the middle or end of the writ. Carth. 69.

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But this is now but form, and aided after verdict by the express words of the statute 16 & 17 Car. 2, c. 8; [which statute, by 4 Ann. c. 16, is extended to judgments by confession, *nihil dicit*, or *non sum informatus*. And it is further enacted by this last statute, that this omission of a *profert* shall not impede the judgment, except the same shall be specially and particularly set down and shown for cause of demurrer.

Vent. 222.]

|| If a plaintiff declares as administrator, where he needs not; the want of *profert* cannot be objected even on a special demurrer.

Crawford v. Whittall, Dougl. n.||

[If there are several executors named, one cannot sue alone, until the others have renounced.

4 T. R. 565.]  $\beta$  An executor who has a claim against the estate of his testator, depending on a *quantum meruit* only, may exhibit a bill in equity against his co-executors and legatees, to have such claim established and fixed at a certain sum. Baker v. Baker, 3 Munf. 222.g

|| But if one of several administrators be sued, and judgment be had against him, without his pleading that there are others not named, such recovery, it seems, shall bind him and his companions.

Farther v. Farther, Cro. Eliz. 471; 1 Sid. 334, S. C., cited by Windham, J.||

$\beta$  A, one of three executors, was indebted to the testator by simple contract at the time of making the will, refused to act, and the other two proved the will and administered; afterwards A gave bond to the acting executors for the amount of the debt due to the testator: more than a year afterwards, A took upon himself the office of executor and cancelled the bond: it was held that the other executors might maintain an action against him and recover the amount, declaring on it as cancelled and destroyed.

Gardiner v. Miller, 19 Johns. 188.g

|| Where one executor has alone proved he may sue without making the others parties though they have not renounced.

Davies v. Williams, 1 Sim. R. 5.

An executor filed a bill before probate. Plea that he had not proved the will allowed.

Simons v. Milman, 2 Sim. 241.

In an action by an administrator, counts on promises made to the intestate may be joined with counts on promissory notes given to the administrator since the intestate's death; for the amount when recovered will be assets in the hands of the administrator.

Partridge v. Court, 5 Price, 412; 7 Price, 591.

But where the cause of action accrues to the executor, after the death of the deceased, he has the option of declaring in his private character.

Brassington v. Ault, 2 Bing. 177; 9 Moo. 340.

An executor derives title not from the probate, but from the will, and a probate granted to one executor enures to the benefit of all, and all must join in an action brought in that character.

Webster v. Spenser, 3 Barn. & A. 360. See 2 Young & J. 75.

Thus, where one of two executors having alone proved the will and received money due to the testator, permitted it to be lent out to a third person; it was held, that both executors might join in an action to recover the money from the party in whose hands it was.



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In an action against an executor a count cannot be joined which charges him personally; for the judgment in the one case would be *de bonis testatoris*, and in the other *de bonis propriis*; therefore a count for money had and received by an executor cannot be joined with a count on an account stated by the defendant as executor, for the former count charges him personally, the latter only to the extent of assets; but it seems a count for money paid for defendant as executor may be joined with such a count on an account stated.

Ashby v. Ashby, 7 Barn. & C. 444; 1 Mann. & Ry. 102; and see 9 Barn. & C. 66; 1 Barn. & Adol. 6.

And a count in *assumpsit* against husband and wife, who was administratrix, with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by husband and wife as administratrix for use and occupation by them after the death of the testator.

Wigley v. Ashton, 3 Barn. & A. 101.]

(P) Of Actions and Remedies against Executors and Administrators: And herein,

### 1. Upon what Contracts or Engagements of their Testators or Intestates Executors or Administrators are liable.

It is clearly agreed, that executors and administrators, standing in the place of those they represent, shall be answerable for all their debts, (a) covenants, &c., as far as they have assets, and that the testator's covenants shall extend to them, though not (b) expressly mentioned.

Off. of Exec. 117; Cro. Car. 187; Jon. 223; Yelv. 103. β A distinction has been made between executors and administrators. The power of the latter is said to be joint, that they must therefore sue and be sued jointly; appear and plead jointly; that they cannot plead severally as executors may, and that judgment against them must be in their joint capacity. Dickerson v. Robinson, 1 Halst. 195. g (a) But it is said that the testator cannot bind his executor where he is not bound himself; as, if he covenants that his executor shall pay 10*l*. no action lies for this. Cro. Eliz. 232. *Sed qu.*—If a father articles to pay J S 1000*l*. to build a house on lands of which he is seised in fee, and dies before the house is built, the heir may compel J S to build the house, and the father's executor to pay for it. 2 Vern. 322, Holt v. Holt. (b) That in every case where the testator is bound by covenant, the executor shall be bound by it, if it be not determined by his death. 48 E. 3, 2; Bro. Covenant, 12; Cro. Eliz. 553; Dyer, 14, pl. 69; 2 Mod. 268. Same rule, and what shall be a determination, vide And. 12; Leon. 179; Moor, 74, pl. 204; Bendl. 150; Dyer, 257; Cro. Eliz. 157. β Whenever promises, express or implied, have been made to or by an administrator, after the death of the intestate, the action must be brought by or against the administrator personally. Grier v. Houston, 8 S. & R. 402; Jones v. Moore, 5 Binn. 573. g

And therefore where a man covenanted that A should serve B as an apprentice for seven years, and died, it was holden, that if A departs within the term, a writ of covenant lies against the executor of the covenantor without naming.

Bro. Covenant, 12.

If a man be bound to instruct an apprentice in a trade for seven years, and the master die, the condition is dispensed with, for it is personal; but, if he were likewise bound to find him with meat, drink, clothes, and lodging, this the executors are obliged to perform.

Sid. 216; Keb. 761, 820; Lev. 177, S. C.

If A leases to B, and B covenants to repair, &c., and he assigns to J S, who dies intestate; the premises being out of repair, the lessor may bring covenant against his administrator as assignee, and declare, that he

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made a lease to B, &c., *cujus status et residuum termini annorum, &c., devenit, &c., per assignationem* to the administrator.

Carth. 519; Tilney v. Norris, Salk. 309, 316, S. C.; Ld. Raym. 553, S. C.

The executor of a lessee for years must pay the rent reserved, though the rent be of greater value than the land.

Off. of Exec. 119; Salk. 297, pl. 6.

And if an action of debt be brought against an executor for the arrearages of a rent reserved upon a lease for years, and (a) incurred after the death of the testator, the writ (b) shall be in the *debet* and *detinet*, (c) because the executor is charged of his own possession.

Ro. Abr. 603; Cro. Eliz. 711; Moore, 566; Brownl. 56; Cro. Ja. 411, 546; Bulst. 23; 2 Brownl. 206; Cro. Car. 225; Allen, 34; Mod. 186; 2 Brownl. 202; Palm. 116, S. P. (a) Where part incurred in the time of the testator, and part after his death, his executor may be charged in the *detinet* for the whole. Allen, 76; Stil. 118. (b) He may be charged in the *detinet* only, but then he shall answer only out of the testator's estate. Royston v. Cordrye, All. 42; Sty. 79, S. C.; Helier v. Casebert, 1 Lev. 127, S. P.; Hope v. Bague, 3 East, 6, S. P. (c) For though they have the land as executors, yet nothing shall be employed to the execution of the will, but such profits only as are above that which is to make the rent; and, therefore, so much of the profits as is to make or answer the rent, they shall take to their own use, and they shall be charged for it in the *debet* and *detinet*. Poph. 120; 5 Co. 31; Cro. Eliz. 712.—And if the land be not worth more than the rent, it is a good plea to such action in the *debet* and *detinet*; for in such case he is to be charged in the *detinet* only. Vent. 171, *per Curiam*; and for this vide Palm. 118; Sid. 266; Mod. 185.—But where they are to be charged upon a lease made to the testator, and have not the profits of the lease to answer it, they ought to be charged in the *detinet* only; as where debt is brought against an executor of a lessee for rent incurred after assignment of the term. Poph. 120; Sid. 266; Lev. 127; 3 Mod. 327. So, if brought against him after waiver of the term. Lev. 127; and vide Allen, 43.

But, though he is to be charged in the *debet* and *detinet*, yet the executor may plead that he has not assets, and that the land is of less value than the rent, and demand judgment, if he ought not to be charged in the *detinet* only; but so long as he hath assets he cannot waive the term, or say that it is of less value than the rent; but after he hath discharged himself of the assets, he may waive the possession by giving notice to the reversioner.

Salk. 297; Off. of Exec. 119.

Also, in all actions against executors and administrators, the charge must be in the (d) *detinet* only; for they are only chargeable in respect of the assets.

8 Co. 159, 536. (d) But it hath been holden, that if debt be brought against an administrator in the *debet* and *detinet*, for rent due before his time, where it should be only in the *detinet*, that this is aided after verdict by 16 and 17 Car. 2, c. 8. Sid. 379.

But, if an executor obliges himself to pay a debt due by contract by the testator; in debt upon this obligation, the writ may be in the *debet* and *detinet*, because the obligation makes it his own debt.

Ro. Abr. 603. β On a promise made by an administrator to pay the intestate's debt, he must be sued as administrator. Forbes v. Perrie, 1 Har. & Johns. 109.g

So, after (e) judgment against an executor, one may in a new action of debt in the *debet* and *detinet* suggest a *devastavit*, and thereby charge him *de bonis propriis*.

Sid. 398. (e) That it must be after a judgment against him, vide Ro. Abr. 603; 5 Co. 32; 2 Lev. 145; 1 Vent. 315, 321; Sid. 63.\*—\*See 1 Saund. 217; Carth. 2; 2 Lev. 161, 209. β To entitle the plaintiff to judgment *de bonis propriis* in an action of debt suggesting a *devastavit*, where the plaintiff is an executor, he ought to declare in the *debet* and *detinet*, or he cannot have judgment *de bonis propriis*, but only *de bonis testatoris*. Spottswood v. Price, 3 H. & M. 123.g Upon a judgment against husband and

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wife executrix, if she survive, debt does not lie suggesting a *devastavit* by the husband; for though chargeable for the wasting by the husband, she shall not be charged *de bonis propriis*, for costs recovered against the husband. R., 2 Lev. 161. {If the executor is charged in the *detinet* only, suggesting a *devastavit*, the defect is cured after verdict by the statute of jeofails. 3 East 2, Hope v. Bague. And even independent of the statute, the plaintiff, if he could entitle himself to judgment against the executor *de bonis propriis*, may waive part of his right and charge him in the *detinet* only, so as to entitle himself to the judgment *de bonis testatoris*. 3 East, 4, 5; All. 42, Royston v. Cordyre.}

¶ And the executor may be charged in such case in the *detinet* only. And where a plaintiff, who had recovered judgment against a testator in his lifetime, had afterwards judgment of execution against the executor in *scire facias*, and upon that judgment sued the executor in debt in the *detinet* suggesting a *devastavit*; it was holden, that the executor being fixed conclusively with assets by the last judgment, it was upon him on the plea of *non detinet* to prove the due administration of the assets.

Hope v. Bague, 3 East, 2.

Where an executrix gave an acceptance for a debt due from her testator, taking an engagement from the drawer to renew the bill from time to time till sufficient effects were received from the estate of the testator; it was held, that this meant sufficient effects in the ordinary course of administration, and that she had not precluded herself from applying, before paying the acceptance, assets to pay 3,000*l.* to trustees for her own use in discharge of a bond of her husband the testator, given before marriage.

Bowerbank v. Monteiro, 4 Taunt. 844. The engagement here was in writing. If it had been by parol, it would not have been admissible in evidence. Hoare v. Graham, 3 Camp. 51.

Debt does not lie against an administrator upon a simple contract of his intestate.

Barry v. Robinson, 1 New R. 293.

An administrator is not liable personally for rent of premises of the intestate, although he has taken possession of them, if he proves that the premises have been productive of no profit to him, and that eight months after the death of the intestate he offered to surrender them up.

Remnant v. Bremridge, 8 Taunt. 191; 2 Moo. 94.

In an action against an executor on an account stated of moneys due from him, as such, he is personally liable; but on an account stated with him of moneys due from his testator, he is liable only as executor.

Powell v. Graham, 7 Taunt. 580; 1 Moo. 305.

On a reference between A and B, administrator, &c., if the arbitrator award B to pay a certain sum, B is personally liable to attachment for non-payment, though he have no assets.

Worthington v. Barlow, 7 Term R. 453; and see Dowse v. Coxe, 3 Bing. 20.

Where a feme covert having an estate to her separate use, gave a bond to the plaintiff for repayment of money advanced by him to her son-in-law, and after her husband's decease she promised that her executors should pay the bond, the executors were held liable on this promise of the testatrix, for there was a strong moral consideration to support it.

Lee v. Muggeridge, 5 Taunt. 36.

An action lies against an executor to recover a specific chattel bequeathed after his assent to the bequest.

Doe v. Guy, 3 East, R. 120.

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A promissory note by which the makers as executors jointly and severally promise to pay *on demand* with *interest*, renders them personally liable.

Childs v. Monins, 2 Bro. & B. 460; 5 Moo. 282; and see Wightman v. Townroe, 1 Maule & S. 412.

Executors holding a party to bail for a debt due to the testator without reasonable or probable cause, are liable to costs under the statute 43 G. 3, c. 146, § 3.

Feely v. Read, 5 Barn. & A. 515, n.

If plaintiffs suing as executors on a count founded on an account stated, after testator's decease, with plaintiffs as executors of moneys due from the defendant to plaintiffs as executors, and on a promise to plaintiffs as executors, are nonsuited, they are liable to pay costs; for they might have sued in their own right.

Jones v. Jones, 1 Bing. 249; 8 Moo. 146; Dowbiggin v. Harrison, 9 Barn. & C. 666; Jobson v. Forster, 1 Barn. & Adol. 6.

A defendant may be declared against as executor or administrator, though the process only describe him generally.

Watson v. Pilling, 3 Bro. & B. 4.

So it is as to a plaintiff, executor, or administrator.

Tidd's Prac. 150.

A declaration against an executor suggesting a *devastavit*, brought in the *detinet* only, is at any rate good after verdict; but it seems that, independent of the verdict, the plaintiff may on such a declaration take judgment *de bonis testatoris*, having waived part of his right by not declaring in the *debet*.

Hope v. Bague, 3 East, R. 2.

A promise made on good consideration by a testator that his executor shall pay, is the subject of an action of *assumpsit* against the executor, without averring assets or any promise by the executor. If there are no assets this is matter of defence.

Powell v. Graham, 7 Taunt. 580; 1 Moo. 305.

A count for money had and received by defendant as executor, charges him personally, and therefore cannot be joined with a count for money due from him as executor, on an account stated as executor of money due from him as executor: for this count only charges him as executor.

Ashby v. Ashby, 7 Barn. & C. 444.

If an attorney employed for fees by an intestate to investigate a title to be conveyed to the intestate, and to see that it is a good one, omit to do so, the administrator may sue on the implied contract on the part of the attorney to do his duty, alleging an injury to the personal estate of the deceased; as the deceased might have elected to sue in case or *assumpsit*, the administrator may sue in *assumpsit*.

Knight v. Quarles, 2 Bro. & B. 102; 4 Moo. 532.

An executor of an executor must plead *plenè administravit* by the first executor as well as by himself, or must at least show that he has no assets of the first executor, out of which any *devastavit* by him could be made good.

Wells v. Fydel, 10 East, 315.

Though an executor may confess judgment to one or more creditors in equal degree, after action brought by another creditor, and plead the judg-

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ments in bar, yet he cannot plead a general judgment to one creditor for his own debt and in trust to pay the other creditors.

Tolbutt v. Wells, 1 Maule & S. 395; and see Prince v. Nicholson, 5 Taunt. 665; 1 Marsh, 280; Meux v. Howell, 4 East, 10; Littleton v. Cross, 3 Barn. & C. 317.

No action lies for a distributive share of an intestate's property against the administrator, or against his executor, although he has expressly promised to pay it.

Jones v. Tanner, 7 Barn. & C. 542.

Where a man, who had for some years cohabited with a woman who passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad; it was held, that the woman might have the same authority to bind him by her contracts for necessaries as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received.

Blades v. Free, 9 Barn. & C. 167.

In an action against several defendants as executors, with a plea of *ne unques* executors, the plaintiff may have a verdict against the real executor, on the count laying the promises by the testator, and the other defendants must be discharged.

Griffiths v. Franklin, 1 Moo. & Malk. 146.

On a plea by several executors, that they have fully administered, if some are shown to have assets in their hands, and the others not, the latter are entitled to a verdict.

Parsons v. Hancock, 1 Moo. & Malk. 330.

On a plea of *plenè administravit* to an action against an administratrix, an unsatisfied creditor of the intestate is a competent witness for the defendant.

Davies v. Davies, 1 Moo. & Malk. 345.

Debt lies against an executrix upon a cause of action accruing after the death of the testator.

Riddle v. Sutton, 5 Bing. 200.

Where an executrix referred to arbitration certain disputes and differences respecting certain unsettled accounts, and the arbitrators, without finding assets, awarded her to pay a certain sum; it was held, that *plenè administravit* was no bar to an action on the award.

Riddle v. Sutton, 5 Bing. 200.

If executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable, upon an implied contract, to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances.

Tugwell v. Heyman, 3 Camp. 297; Rogers v. Payne, 3 Younge & J. 28.

Where one, appointed executor, intermeddled with the estate of the testator, and afterwards renounced; it was held, that he was liable to be sued in equity, in the character of executor, by the legatees under the will, one of whom was also executrix, and had proved the will.

Rogers v. Frank, 1 Younge & J. 409.

## 2. Of Personal Torts, which are said to die with the Party.

The taking up of an executorship is an engagement to answer all debts of the deceased, and all undertakings that create a debt, as far as there are

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assets; but doth not embark executor in the personal (*a*) trusts of the deceased; nor is he obliged to answer for his several injuries; for none can tell how they might have been discharged or answered by the testator himself.

Plow. 181; Off. of Exec. 120. (*a*) For this reason it seems that executors were not chargeable in account, because not supposed to be conusant enough in the particular dealings of their testator, vide tit. *Account*.—Hence also it hath been holden, that if A bails goods to B to which C hath a right, and B dies, that the executors of B must deliver these goods to C, and are no ways accountable for them to A, for they came to the possession by the law; and therefore must only deliver them to those persons in whom the law hath established the property. Ro. Abr. 607. *ℓ* Case against executors does not lie for the testator's erecting a nuisance across the highway, where the plaintiff's horse, in attempting to pass, was killed. *Hawkins v. Glass*, 1 Bibb, 246.*g*

Hence it hath been established as a maxim, that *actio personalis moritur cum personâ*: and on this foundation it was formerly holden, that there was no remedy for the recovery of a debt due by simple contract by the testator, especially by action of debt; for herein the testator might have waged his law, of which benefit his executor is deprived.

Ro. Abr. 25; 9 Co. 86; 4 Co. 93; Cro. Eliz. 121, 425; And. 182; Leon. 165; Goldsb. 106; Moore, 366; Poph. 31. *ℓ* An executor may enter up a judgment on a verdict obtained on an action by his testator in libel. *Palmer v. Cohen*, 2 B. & A. 966.*g*

But it is now agreed that an (*b*) action lies against executors, where there is a duty as well as a wrong; and that they are answerable in those personal actions which arise *ex contractu*, and not *ex maleficio*; for that every contract implies a promise to perform it, in which the testator himself could not wage his law, because he could not make oath that he had discharged the duty before the *quantum* had been ascertained by a jury.

9 Co. 87; 10 Co. 77 b; Cro. Ja. 293; Vaugh. 101. *ℓ* Case may be maintained against executors for the seduction of the plaintiff's slave by the testator. *Cutlar v. Brown*, 2 Hayw. 182. And trover, trespass, deceit, or any other action of the like nature, will lie against executors, when the thing itself has been used, so as to increase the testator's estate, and the benefit thereof has been received by the executors. *McKinnie's Executors v. Oliphant's Executors*, 1 Hayw. 3.*g* (*b*) That although debt on a simple contract cannot be recovered against an executor by action of debt, yet it may by assumpsit. Lev. 200.

So, where in case against an executor the plaintiff declared, that he prosecuted an attachment of privilege against the testator; and that the testator, in consideration that he would forbear any further proceedings, promised to pay him 50*l.*; it was holden, that the action lay against the executor, this being such a contract as bound the testator himself.

Hob. 216, *Bidwell v. Catton*.

Also, it hath been resolved, that there is no difference between a promise to pay a debt certain, and a promise to do a collateral act, which is uncertain, and rests only in damages, as a promise to give such a fortune with his daughter, to deliver up such a bond, &c., and that wherever in those cases the testator himself is liable to an action, his executors shall be liable also.

Cro. Ja. 405, 417, 571; Jon. 16; *Fawcett v. Carter*, Palm. 329; Cro. Ja. 662, S. C.; Ro. Rep. 266, *Sander v. Esterlie*, S. P.

So, where a prohibition was prayed, because a parson libelled in the spiritual court for tithes subtracted (*c*) by the testator against an executor, upon this ground, that it was a personal tort that died with the person; at least that the penalty given by the statute should not be recovered after the party's death who offended; the court denied the prohibition, and held, that

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the rule, that *quod oritur ex delicto et non ex contractu* should not charge the executor, did not extend to the case of tithes.

Raym. 95, Wilks v. Russel; Sid. 181, and Keb. 682, S. C. So, Hale v. Bradford, Sir T. Raym. 57; Lev. 39, S. P. (c) So, where an administrator to his son brought leib for tithes, it was moved in arrest of judgment, that this action being given for the contempt and wrong done to the intestate, does not lie for the administrator; the intent of the statute 2 & 3 E. 6, c. 13, being to give remedy only to the party grieved. But it was resolved, that it lay for the administrator of the party grieved, that here was a duty as well as a wrong. Vent. 30, Sir William Moreton and Hopkins; 2 Keb. 502, S. C.; Sid. 407, S. C.; in which last book it is said, that it will not lie against the executor of him who did the wrong. But *qu.*; and vide Yelv. 63; 2 Inst. 650; Ro. Abr. 912.

Trover lies against executors, for this action is not merely *ex maleficio*, which dies with the person, but here there is supposed an intention in the testator to restore the goods to the right owner, for the law will not presume an intention of injury in any person; and therefore the *maleficio* is in the executors, in not making restitution accordingly.

Vide tit. *Trover and Conversion*. β Trover lies against executors for a conversion in the lifetime of their testator. Decrow v. Moore, 1 Hayw. 21; Clark v. Kenan, 1 Hayw. 308; Avery v. Moore's Executors, 1 Hayw. 362. γ [Trover will not lie against executors upon a conversion by the testator, in respect of the form of the plea. Hambly v. Trott, Cowp. 375.]

And though the rule at common law, that a personal action dies with the person, hath been construed equally to extend to wrongs and injuries done by or to the testator; such as assaults and batteries, breaches of trust, &c.; yet it seems, that an executor in some cases may, within the equity of 4 E. 3, c. 7, *de bonis asportatis in vita testatoris*, maintain an action for an injury done to his testator; whereas, if it had been done by the testator, it would have come within the rule of *actio personalis moritur cum personâ*.

4 Mod. 403; Salk. 12, 314; Ld. Raym. 40, 973; 6 Mod. 125.

And therefore, it hath been holden, that if a sheriff suffers a person in his custody on mesne process to escape, the executor of the party, at whose suit he was in custody, may maintain an action against him; because the body of the prisoner being a pledge for the debt, the executor might be otherwise without any remedy, which is an injury to the goods, and not to the person of the testator: (b) but in this case, if the sheriff died, the party could have no remedy against his executor.

Jon. 173; Poph. 189; Latch. 167; Noy, 87; Mason v. Dixon, Cro. Car. 297, S. P.; Ro. Abr. 921, S. P.; 6 Mod. 126, S. P.; and the same diversity. (b) So, an executor may charge another executor for a *devastavit*, to the injury of his testator; but at common law, the executor of an executor was not liable for a *devastavit* of the first executor. Salk. 314, pl. 22; 2 Ld. Raym. 971.—[See *infra*, Div. 3.]

So, where to a *feri facias* the sheriff made a false return, viz., that he levied only so much, when in truth he had actually levied more; and the executor of the party brought an action for this false return; it was adjudged, that it lay; for this was not properly an injury done to the person of the testator, for then *moritur cum personâ*, but it was an injury to his estate.

Williams v. Carey, 4 Mod. 403; Salk. 12, S. C., adjudged. For by levying the goods a right was vested in the testator. Cro. Car. 297, S. P., but no resolution.

|| So, the executor of a landlord may maintain an action against an officer for removing goods before the payment of a year's rent, for the testator had an interest in them, and the removing of them was a wrong to his estate.

Palgrave v. Windham, 1 Str. 12. ||

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β An action survives to the administrator, where the defendant entered into the intestate's lands in his lifetime and burned his mills.

Griswold v. Brown, 1 Day's Cases, 180.

An action on the case does not lie for the executor for the expenses of a malicious suit brought against the testator.

Deming v. Taylor, 2 Day's Cases, 286.g

[Actions survive against an executor, or die with the person, either on account of the cause of action or on account of the form of action. As to the former, where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labour, or property of another, or a promise of the testator, express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or ariseth *ex delicto*, supposed to be by force and against the king's peace, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water-course, escape against the sheriff, and many other causes of the like kind.—As to the latter—in some actions the defendant could have waged his law; and, therefore, no action in that form lies against an executor.(a) But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be that *the testator was not guilty*, can lie against the executor. Upon the face of the record the action ariseth *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

Cowp. 375, per Lord Mansfield.] [(a) This is perhaps too broadly stated. It is not true that in that form of action which admitted of wager at law by the testator, his executor could not be sued. The writ was indeed abateable for that reason, if the executor chose to insist upon it; but, if he omitted to do so, and pleaded over, the debt was as necessarily and conclusively fixed by the judgment in that form of action, as if it had been demanded by an action, in which the testator could not have waged his law. Vaugh. 97, &c.]

### 3. Of Remedies against Executors, or Administrators of Executors.

It seems agreed, that executors or administrators of executors or administrators were not at (b) common law liable to the *devastavit* of those they represented, because they could not be supposed to know how their testators or intestates had disposed of the goods; and therefore this was esteemed *actio personalis quæ moritur cum personâ*.

Ro. Abr. 920; 2 Lev. 110, 133; 3 Keb. 462, 530; Vent. 292. (b) But in Chancery such executors and administrators were made liable as far as they had assets. 2 Mod. 293; Chan. Ca. 302; 2 Chan. Ca. 217; 2 Stra. 716.—And that in equity creditors and legatees may follow the assets into whose hands soever they come. Chan. Ca. 57; 2 Vern. 75.

But it being found very inconvenient, that where an executor *de son tort* died, there could be no remedy at law against his executors or administrators; or that where a lawful executor made an alteration of the goods of the testator, and died, that creditors to the first testator should be disappointed of their debts, though such executor left sufficient assets;

Therefore, by the act of 30 Car. 2, c. 7, creditors were enabled to recover their debts of the executors and administrators of executors in their own wrong; and this act, by the 4 & 5 W. & M. c. 24, is made perpetual; and also by the last-mentioned act, reciting, "That it had been a doubt (c) whether the 30 Car. 2, did extend to any executor or executors, admi-



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nistrator or administrators of any executor or administrator of right, who, for want of privity in law, were not before answerable, || nor could be sued for the debts due from or by the first testator or intestate, notwithstanding that such executors or administrators had wasted the goods and estate of the first testator or intestate, or converted the same to his or their own use; || it is enacted and declared, that all and every the executor and executors, administrator or administrators of such executor or administrator of right, who shall waste or convert to his own use goods, chattels, or estate of his testator or intestate, shall from thenceforth be liable and chargeable in the same manner as his or their testator or intestate should or might have been."

|| (c) In *Holcomb v. Petit*, 3 Mod. 113, it had been determined, that the administrator of a rightful executor was liable within this statute. || [But in the case of *Hammond v. Gatcliffe*, And. 252, the court strongly inclined to think, that an executor *de son tort* is not liable for a *devastavit* committed by the first executor *de son tort*, either at the common law, or by these statutes.

|| If a judgment be had against an executor, who afterwards dies, an action may be brought under the above statutes against his executor or administrator, suggesting a *devastavit* by the first executor; and the judgment is as conclusive upon the representative of the executor, that he (the executor) had assets to satisfy the judgment obtained against him, as it is upon the executor himself. Therefore if an action of debt, suggesting a *devastavit* by the first executor, be brought against his executor or administrator, he cannot plead that the first executor fully administered the goods of the first testator, or any other plea purporting that he (the first executor) had no assets to satisfy the judgment, any more than the executor himself could have done. For whatever act of the executor would have made him personally liable and chargeable with the payment of the demand *de bonis propriis*, will now, by virtue of these statutes, make his estate liable in the hands of his executor or administrator. But such executor or administrator may himself plead *plenè administravit*, for the *devastavit* being only a simple contract debt, he is at liberty to show that he has fully administered the effects of his testator or intestate.

1 Saund. 219, Serjt. Williams's note and the case of *Skelton v. Hawling*, Tr. 23 G. 2, K. B., there correctly stated from the Roll. 1 Wils. 258, S. C. See *Hope v. Bague*, 3 East, 5. ||

### 4. Where Executors and Administrators shall be excused from Costs.

Executors and administrators, when plaintiffs, pay no costs; for they sue in *auter droit*, and are but trustees for the creditors, and are not presumed to be sufficiently conusant in the personal contracts of those they represent; and therefore are not comprehended within the statutes 23 H. 8, c. 15; 4 Ja. 1, c. 3, or 8 & 9 W. & M. c. 10, which give defendants costs.

Cro. Ja. 228; Yelv. 168; N. Bendl. 19; Brownl. 107; Keilw. 207; Hut. 69, 79; Cro. Eliz. 69, 503; Cro. Car. 289; Winch. 10, 70; Ro. Rep. 63; Sav. 133; Carth. 281; 4 Mod. 244; 3 Lev. 375; Skin. 400; Str. 682. β When an executor commences a wrong suit by mistake, or has ascertained facts since the commencement of the suit, which would render it useless to proceed, he may discontinue without costs. *Arnoux v. Steinbrenner*, 1 Paige, 82.g

But, if executors or administrators bring an action in their own right, as for a conversion or trespass in their own time, they shall pay costs, although they name themselves executors, for this is but surplusage.

Savil. 134; Hut. 79; Dal. 9; Latch. 220; Vent. 92; 6 Mod. 94, 181; 7 Mod. 98, 118. But for this, and where the action shall be said to be in their own right, vide tit. *Costs*, letter (E).

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So, an executor defendant shall pay costs in all cases, and the judgment is *de bonis testatoris, si, &c., et si non, tunc de bonis propriis*. Also when he is defendant, and there is judgment for him, he shall have his costs.

Plow. 183; Hard. 165; Cro. Eliz. 503; Hut. 69.

|| Where an executrix pleaded, 1st, *Non assumpsit*; 2d, *Ne unques executrix*; and, 3d, *Plenè administravit*; and the issues on the first two pleas were found for the plaintiff, and the issue on the last for the defendant, it was holden, that the defendant was entitled to the general costs of the trial, the last plea being a full and complete answer to the action.

Edwards v. Bethel, 1 Barnw. and Alders. 254. Vide Hindsley v. Russell, 12 East, 232, *et supra*. vol. ii. p. 520.

If an action of assumpsit is brought by an administrator against an inhabitant of Middlesex, and the damages found are under 40s., the defendant is entitled to have that suggested on the roll in the same manner as if the action had been brought in the plaintiff's own right. What the consequence may be, whether only to protect the defendant from the payment of costs, or to subject the plaintiff to the payment of double costs to the defendant, *qu.*

Wase v. Wyburd, Dougl. 246.||

A judgment was had against an administrator for costs *de bonis propriis*, and error brought that it ought to have been *de bonis testatoris, et si nulla bona*, then *de bonis propriis*. This was agreed to be error; but, whether this judgment for the costs might not be reversed without affecting the principal judgment was the question, they being distinct judgments. And it was holden by Holt, Chief Justice, that if judgment be given for recovery of dower and mesne profits and damages, it may be reversed for the one, and stand for the other. And he took this difference; if one part of the judgment be warranted by act of parliament, and the other by common law, it may be reversed for part, and stand for the other; but, if all be at common law, it must stand or be reversed in all. And in this case the judgment for the costs was reversed, and the principal judgment affirmed.

Trin. 6 Ann. in B. R., Hickman and Westbrook. β In case of discontinuance or *non pros.*, executors are not liable to pay costs to the opposite party *de bonis propriis*. Musser v. Good, 11 S. & R. 247.*g*

[In an action by an executor or administrator, the plaintiff not being liable to costs, the defendant was not allowed formerly to bring money into court; but now it is otherwise, and the effect of the rule will be not to make the plaintiff pay, but only lose his costs.

2 Salk. 596; 2 Str. 796.]

|| Where a person sued as executor, having obtained a regular probate, and was nonsuited at the trial upon evidence that the supposed testator was still alive; the court refused to allow the defendant's costs, it appearing from the affidavits on both sides to be still at least doubtful, whether the supposed testator were living or not.

Zachariah v. Page, 1 Barnw. & Alder. 386.|| β On a judgment against an executor as in case of a nonsuit for not proceeding to trial, he must pay costs. Brown v. Lambert, 16 Johns. 148. When executors are plaintiffs and judgment is given against them on demurrer, they must pay costs. Sallisbury v. Phillips, 12 Johns. 289.*g*

β When the executors could sue in their own right, costs are sometimes given against them; but when the action is or must be brought in their representative capacity alone, the rule is different.

5 Litt. 314; 1 J. J. Marsh. 363; 3 Monr. 17; 6 Monr. 410.*g*

## Extinguishment.

5. *Executors and Administrators excused from putting in Special Bail.*

Executors and administrators are not to be holden to (a) special bail; for the demand is not on the persons, but on the assets of the deceased; and it would be unreasonable to subject their persons to an execution for the debt of another.

Cro. Ja. 350; Yelv. 53; Cro. Car. 59; Lit. Rep. 2. (a) Although an attorney be plaintiff, and it was pretended he was entitled to have special bail by his privilege. Sid. 63. So, though the cause is removed from an inferior court to a superior; for this would encourage plaintiffs to commence their actions against executors in such inferior courts. 2 Lev. 204; Sid. 418; Lev. 245, 268; 2 Jun. 82; Salk. 98, pl. 4; but Lit. Rep. 81, *cont.*

Hence it hath been holden, that if there be a judgment against an executor for the debt *de bonis testatoris*, and for the damages only *de bonis propriis*, he may bring error, and have a *supersedeas*, without giving sureties, according to 3 Ja. 1, c. 8; for though the words of the statute are general, yet it must be intended where judgment is against the defendant himself upon his own bond, or where the judgment is general against executors; for it would be unreasonable they should find sureties to pay the whole out of their own estate.

Cro. Ja. 350; Goldsmith v. Platt, Cro. Ja. 59, S. P.; Lit. Rep. 2, S. P.; Keb. 716, S. P.

But upon a *devastavit* executors shall be holden to special bail. And herein the difference is, that upon a bare suggestion of a *devastavit*, an executor shall not be holden to special bail; (b) but, where upon a judgment against him execution is taken out, and the sheriff returns a *devastavit*, upon an action of debt upon this judgment the executor shall be holden to special bail.

1 Lev. 39; 1 Sid. 63; Carth. 264; Comb. 206; 1 Salk. 98. [(b) He may be holden to bail in each case: in the last, by a judge's order without any affidavit; in the first, not without an affidavit.]

[Where an executor hath personally promised to pay a debt or legacy, it seems, that he may be holden to bail on such promise.

Mackenzie v. Mackenzie, 1 T. R. 716.]

## EXTINGUISHMENT.

WHEREVER a right, title, or interest is destroyed or taken away by the act of God, operation of law, or act of the party, this in many books is called an extinguishment.

Co. Lit. 147 b; Ro. Abr. 933.  $\beta$ Extinguishment is the annihilation of a collateral thing or subject, in the subject itself out of which it is derived. Preston on Merger, 9.g

But as it is a word of a large signification, and relative to other things elsewhere treated of, I shall here only consider it briefly as it regards the following matters, to which it seems to be most frequently applied.

(A) Of the Extinguishment of Rents.

(B) Of the Extinguishment of Copyholds.

(C) Of the Extinguishment of Common.

(D) Of the Extinguishment of Debts.

## (A) Of the Extinguishment of Rents.

If a lessor purchases the tenancy from his lessee, the lessor cannot have both the rent and the land; nor can the tenant be under any obligation to pay the rent, when the land which was the consideration thereof is resumed by lessor into his own hands. And this resumption or purchase of the tenancy makes what is (a) properly called an extinguishment of the rent; that is, the rent can never become due or payable by the tenant, by virtue of the donation which created the tenancy, when the land or tenancy is conveyed to the lessor, in as absolute a manner as he was seised of the rent.

Pollexf. 142. (a) [That the rent in this case is extinguished. Vaugh. 199. But, if a rent be granted to A for the life of B, and A dies, living B, the rent is determined upon the death of A equally as if granted to him for his own life; and in this case the rent is said more properly to be *determined* than extinguished. Vaugh. 199.— So, when either the rent or the land is so conveyed, not absolutely or finally, but for a certain time, after which the rent will be again revived; this is properly called a *suspension* of the rent. Vaugh. 199.]

But, if the conveyance to the lessor was not absolute, but upon condition; or if it were only of a particular estate of shorter duration than the estate which the lessor had in the rent; in these cases, though there be an union of the tenancy and rent in the same hand, yet because that union is but temporary, for upon the performance of the condition, or determination of the particular estate, the tenant is restored to the enjoyment of the land, and, consequently, the obligation to pay the rent revives; therefore the rent in such case is only *suspended*, and not extinguished.

Bro. *Extinguishment*, 17; Vaugh. 39, 199; Pollexf. 142. {To extinguish the rent, there must be a union of the land and the rent in the same person. A vested right to enter and hold the land till payment of the rent, not actually exercised, is not sufficient. 2 Bin. 138; Phillips v. Bonsall.} || The difference which exists in point of law, between the acts in law denominated Merger, Suspension, and Extinguishment, is well stated by Mr. Preston in the following extract from his late valuable elucidation of the abstruse doctrine of merger: "Merger is the annihilation of one estate in another. Suspension is a partial extinguishment, or extinguishment for a time. Extinguishment is the annihilation of a collateral thing or subject in the subject itself out of which it is derived. A rent, a common, or a seignory, may be extinguished. That the estate in the rent, common, or seignory ceases, is the consequence of the extinguishment of the subject itself. When the subject ceases, the estate therein must also cease. Under the doctrine of merger the subject may continue after the annihilation of one estate in another: for notwithstanding the annihilation of the estate, the subject continues, and the effect of the merger is only to involve the time of one estate in the time of another estate, or, at the utmost, to accelerate the right of possession under the more remote estate. Thus suspension and extinguishment, correctly taken, are applicable rather to the things themselves, than to the estates or degrees of interest therein. Again, Suspension is merely for a time, because the party, whose interest is to be suspended, has a particular estate; or because he has a defeasible interest, so that the subject itself, or the estate therein may revive, when there shall be a separation of these interests, which, if they were absolutely united, would be extinguished." "Lord Coke, in Co. Lit. 313 a, has accurately drawn the distinction, with the exception that he has omitted the durability of title. According to his lordship, 'Suspense in legal understanding is taken when a seignory, rent, profit, apprendre, &c., by reason of unity of possession of the seignory, rent, &c., and of the land out of which they issue, are not *in esse* for a time, *et tunc dormiunt*, but may be revived or awaked: and they are said to be extinguished when they are gone for ever, *et tunc moriuntur*, and can never be revived; that is, when one man hath as high and perdurable an estate in the one as in the other.'" Prest. Conveyanc. Vol. iii. p. 9, 10, 11.||

Also, if the lands demised be evicted from the tenant, or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction; and this is also called an extinguishment of

## (A) Of the Extinguishment of Rents

the rent. But, notwithstanding such recovery or eviction, the tenant (a) shall pay the rent which became due (b) before the recovery; because the enjoyment of the land being the consideration for which the tenant was obliged to pay the rent, so long as the consideration continued, the obligation must be in force; there being the same reason that the tenant should pay the rent for part of the time contracted for, as for the whole term, if he had enjoyed the land so long.

2 Ro. Abr. 429; Hob. 82; Cro. Eliz. 47; Co. Lit. 148 b. (a) Though the lease was made by a disseisor, for the lessee came in under the sanction of a legal contract, and the peaceable enjoyment of the land during the time he held it was a sufficient obligation on him to pay the rent. 2 Ro. Abr. 429; Hob. 6. (b) But, if the tenant be ousted by a title paramount before the day appointed for the payment of the rent, such eviction entirely discharges the tenant from the payment of any part of the rent. 10 Co. 128 a.

For the same reason, if part only of the land letten be evicted from the tenant, such eviction is a discharge of the rent in proportion to the value of the land evicted.

10 Co. 128; Ro. Abr. 135; Dyer, 56.

If a man who hath a rent-service purchases part of the land out of which the rent issues, the rent-service is not extinguished, but shall be apportioned according to the value of the land; so that such purchase is a discharge to the tenant for so much of the rent only as the value of the land purchased amounts unto.

Lit. § 222.

But, if a man has a rent-charge, and purchases part of the land out of which the rent issues, the whole rent is extinguished, and, consequently, the tenant discharged from the payment of it.

Lit. § 222, 223; 8 Co. 105.

But in this case, if the grantor by deed reciting the purchase had granted that the grantee should distrain for the same rent in the residue of the land, the whole rent-charge had been preserved; because such power of distress had amounted to a new grant.

Co. Lit. 147.

But the law has carried this notion of extinguishment only to such cases where the grantee of the rent wilfully by his own act prevents the operation of the grant according to the original intention thereof; for if part of the land descends to the grantee of the rent-charge, the rent shall be apportioned according to the value of the land: for the grantee in this case is perfectly passive, and concurs not by an act of his to defeat the intention of the grant; and therefore it would be unreasonable and severe, that he should be punished without his default, or concurring in that act which extinguishes the rent.

Lit. § 224; Co. Lit. 149 b; Ro. Abr. 236.

Hence likewise it is, that if a man grants a rent-charge out of two acres, and afterwards the grantee recovereth one acre by title paramount the grant, the whole rent shall not be extinguished; because the law that gives the remedy for the recovery of a man's right, will not prevent the prosecution of such right, by depriving the prosecutor of a greater profit than the thing recovered may amount to. But in this case there shall be no apportionment, but the grantee shall have the whole rent after he has recovered the one acre; because by the grant each acre is charged with the whole rent;

## (A) Of the Extinguishment of Rents.

and upon the recovery it appears, that the grantor had no interest in one acre, and, consequently, could not charge it; and therefore the grant being to be taken most strongly against him, the whole rent shall continue after the recovery, because the grant was originally for so much, and therefore shall issue out of that land which he had power to charge; whereas in the former case the grantor had, at the time of the grant, power to charge all the land; and therefore when part of the land, subject to such charge, comes to the grantee by act of law, it is reasonable at least that the charge should be apportioned.

Co. Lit. 148 b.

Also, a rent-charge may in some cases be apportioned by the act of the party; as, if the grantee releases part of his rent to the tenant of the land, such release does not extinguish the whole rent; so, if the grantee gives part of it to a stranger, and the tenant attorns, such grant shall not extinguish the residue, which the grantee never parted with, because such release or disposition makes no alteration in the original grant, nor defeats the intention of it, as the purchase of part of the land does, for the whole rent is still issuable out of the whole land according to the original intention of the grant.

Co. Lit. 148 a. But Cro. Eliz. 742, seems *contr.*

Here also, as to the appointment of a rent-service by the purchase of the lessor of part of the tenancy, we must distinguish between services divisible in their own nature, as a rent, and such as are indivisible, as a horse, a hawk, &c. For in the last case, if the lord purchase part of the tenancy, there can be no apportionment of the service from the nature of the thing; and therefore such service is extinct, and the tenant discharged from the payment of it; for the whole tenancy being equally chargeable with the payment of such service, the lord by his own act shall not discharge part, and throw the whole burden upon the residue, for his own private benefit and advantage.

6 Co. 1, Bruerton's case; Co. Lit. 149 a; 8 Co. 105; Moor, 203.

But, if such entire services were for the benefit of the public, as knight service and castle guard, for the defence of the realm, or for the administration of justice; or, if such entire service were a work of charity or piety; in all such cases the tenant is still chargeable with the whole service; for there can be no apportionment, because the thing in its nature is indivisible; and the whole shall not be extinguished, because the public has an interest in such services, and therefore shall not be prejudiced by the private transactions of the parties.

6 Co. 1, 2; Co. Lit. 149.

So, where the tenure is by a service in its nature indivisible, as by a horse, or a hawk, &c., which are only for the private benefit or pleasure of the lord; yet, if part of the tenancy comes to the lord by descent, the service is not extinguished; because here is no consent or concurrence of the lord to the division.

Co. Lit. 149 a.

It was formerly doubted whether a rent-service incident to a reversion could be apportioned, or was not utterly extinguished by a grant of part of the reversion; for since the reversion and rent incident thereto were entire in their creation, it was thought hard, that by the act of the lessor they should be divided; and thereby the tenant made liable to several actions and dis-

## (B) Of the Extinguishment of Copyholds.

treasures for the recovery of them. But it was at length resolved, that the reversion, being a thing in its nature severable, the rent as incident to it may be divided too, because that being made in retribution for the land, ought, from the nature of it, to be paid to those who are to have the land upon the expiration of the lease; and hence it is that the rent passes incidently with the reversion, without any express mention of it in the grant. Besides, the tenant has really no prejudice from such grant, because it is in his power, and it is his duty, to prevent the several suits and distresses by a punctual payment of the rent; and therefore he ought not to complain of a mischief which he wilfully brings upon himself: besides that, (a) formerly, such grants could not take effect without the attornment and consent of the tenant. But on the other hand it would be extremely prejudicial, if upon such grants the rent should not be apportioned, because then the lord could not out of his estate make a provision for his younger children, or answer the contingencies of his family which are in view.

2 Inst. 504; Ro. Abr. 234; Cro. Eliz. 651, 851; Co. Lit. 148; 8 Co. 79; Dyer, 326; Hob. 177; 13 Co. 57, 58; Moor, pl. 255, 260. (a) Viz. before the 4 & 5 Ann. c. 16, § 9.

If lessee for life or years surrender part, or if he commit a forfeiture of part by making a feoffment, or doing waste, there can be no colour to construe these acts an extinguishment of the whole rent; but in these cases the rent shall be apportioned; because the rent is a retribution for the land, and therefore must necessarily cease according to the proportion of the land resumed by the lessor. For it were absurd, that the lessor should have both the land and retribution for it. But the whole rent is not extinguished, because from the nature of the contract the rent is to be paid in consideration of the enjoyment of the land, and therefore the tenant shall be obliged to pay the rent in proportion to the land which he enjoys. So, if the lessor grant the reversion of part to the lessee, the rent shall be apportioned.

Co. Lit. 148 a; Ro. Abr. 235; Dyer, 5 a; 13 Co. 58; Moor, pl. 255.

There seems to have been a variety of opinions, whether the lessor's entering wrongfully into part of the lands demised did not suspend the whole rent during such tortious entry, or whether the rent ought not to be apportioned; and it is now settled, that such tortious entry suspends the whole rent. For if any apportionment were allowed in this case, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract, and so, by taking that which lies most commodiously for the tenant, render the remainder in effect useless, or put him to the expense to restore himself to such part by course of law. And therefore to prevent these inconveniencies, and that no man may be encouraged to injure or disturb his tenant, whom he ought to protect and defend, it hath been resolved, that such disseisin or tortious entry suspends the whole rent, and that the tenant or lessee is discharged from the payment of any part of it till he is restored to the whole possession.

Co. Lit. 148 b; Bro. tit. *Extinguishment*, 48; Ro. Abr. 938; 4 Co. 52; 9 Co. 135; 3 Keb. 453, 497; Pollex. 142, 144; Vent. 277.

## (B) Of the Extinguishment of Copyholds.

As to the extinguishment of copyholds, it is laid down as a general rule, that any act of the copyholder's, which denotes his intention to hold no longer of his lord, and amounts to a determination of his will, is an extinguishment of his copyhold.

Hut. 81; Cro. Eliz. 21; Jon. 41. Vide tit. *Copyhold*, letter (K).

## (C) Of the Extinguishment of Common.

As, *(a)* if a copyholder in fee accepts a lease for years of the *(b)* same land from the lord, this determines his copyhold estate; or *(c)* if the lord leases the copyhold to another, and the copyholder accepts an assignment from the lessee, his copyhold is extinct.

*(a)* Moor, 184; 2 Co. 16 b; Godb. 11, 101. *(b)* But, if he takes a lease for years of the manor, that is only a suspension of his copyhold during the term. Cro. Ja. 84; Sav. 70.—But in other books it is said to be extinguished, as in Cro. Eliz. 7; Moor, 185. And in 4 Co. 31, it is said, that the lessee may in this case re-grant the copyhold to whom he pleases. *(c)* 2 Co. 17; Leon. 70; And. 191; Gouls. 34; Ro. Abr. 510, S. C.

So, *(d)* if a copyholder bargains and sells his copyhold to the lessee for years of the manor, his copyhold is thereby extinguished; or *(e)* if he joins with his lord in a feoffment of the manor, his copyhold is thereby extinct; for these are acts which denote his intention to hold no longer by copy.

*(d)* Hut. 65; Jon. 41, S. C. *(e)* Godb. 11.

So, if a copyholder accepts to hold of his lord by bill under the lord's hand, this determines his copyhold: so, if he accepts an estate for life by parol, if there be livery, this is an extinguishment; otherwise not; for without livery nothing but an estate at will passes, which cannot merge or extinguish an estate at will.

And. 199; Latch. 213.

If one seised of a manor in right of his wife lets lands by indenture for years; this doth not destroy the custom as to the wife; for *(g)* after the death of her husband she may demise it again by copy.

Cro. Eliz. 459. *(g)* So, if a copyholder intermarries with the feme seignioress; this is no extinguishment, but only a suspension. Sav. 66; Co. *Copyholder*, 172. So, if the copyholder hath the manor in execution. Co. *Copyholder*, 172.

So, if a copyhold is in the hands of a subject, who after becomes king, the copyhold is extinct, for it is below the majesty of a king to perform such servile services; yet after his decease the next that hath right shall be admitted, and the tenure revived.

2 Sid. 82; 4 Co. 24; Cro. Eliz. 252, adjudged; and vide 2 Leon. 208; 4 Co. 26 b; Cro. Eliz. 103.

## (C) Of the Extinguishment of Common.

If a commoner, who hath common appurtenant, purchases part of the land in which he hath such common, this is an extinguishment of the common. But, if such purchase had been made by one who had common appendant, this being of common right must be apportioned. Also, both common appendant and appurtenant shall be apportioned by alienation of part of the land to which the common is appendant or appurtenant.

Co. Litt. 122; Hob. 235; 2 Co. 78; Owen, 122; 4 Co. 37.

|| If a copyhold be enfranchised, the common which is claimed in right of it, is gone. Such commonage will not pass by the word "appurtenances" in the deed of enfranchisement; but the right to it must be expressly conveyed as a new grant. A court of equity *(h)* will indeed, under certain circumstances, decree a continuance of it when it is extinct at law.

Fort v. Ward, Moore, 667; Massam v. Hunter, Yelv. 189; Cro. Ja. 253, S. C.; 2 Brownl. 209, S. C.; Bradshaw v. Eyre, Cro. El. 570; Worledge v. Kingswel, Ibid. 794. *(h)* Styant v. Staker, 2 Vern. 250. *supra*.

If a copyholder has common in a waste without the manor of which his copyhold is parcel, he has it as annexed to the land, and not to his cus-



## (D) Of the Extinguishment of Debts.

tomary estate; and such common is not extinct by enfranchisement of the copyhold, but continues, though there be no words of re-grant.

Barwick v. Matthews, 5 Taunt. 365; 1 Marsh. 50, S. C.¶

## (D) Of the Extinguishment of Debts.

It seems to be agreed as a general rule, that a creditor's accepting a higher security than he had before, is an extinguishment of the first debt; as, if a creditor by simple contract accepts an obligation, this extinguishes the simple contract debt.

13 H. 4, 1; Ro. Abr. 470, 471, 604; 6 Co. 44. § The general rule seems to be that if one indebted to another by simple contract give his creditors a promissory note, drawn by himself, for the same sum, without any new consideration, the new note shall not be deemed a satisfaction of the original debt, unless so intended and accepted by the creditor. 15 Serg. & Rawle, 12; 1 Hill's (N. Y.) R. 516; 2 Wash. C. C. R. 191; 1 Wash. C. C. R. 156, 321; 2 Johns. Cas. 438; Pet. C. C. R. 266; 2 Wash. C. C. R. 24, 512; 3 Wash. C. C. R. 396; Add. 39; 5 Day, 511; 15 Johns. 224; 1 Cowen, 711; Bouv. L. D. tit. *Novation*, and *Delegation*; 1 Yerg. 151; Toby v. Barber, 5 Johns. 66; Johnson v. Weed, 9 Johns. 310; Petto v. Beverly, 10 Pet. 532.¶

So, if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court; for by the deed the legacy is extinct, and it is become a mere debt at common law.

Yelv. 38. § A security, under seal, extinguishes a simple contract debt, because it is of a higher nature. Bank of Columbia v. Patterson's Admr., 7 Cranch, 299. When a higher security is given by the debtor himself, *prima facie*, the law presumes it intended as an extinguishment of the debt. *Aliter*, when it is the bond of a third person. United States v. Lyman, 1 Mass. C. C. R. 482; Cummings v. Hackley, 3 Johns. 202.¶

So, if a bond creditor obtains judgment on the bond, or has judgment acknowledged to him, he cannot afterwards bring an action on the bond; for the debt is drowned in the judgment, which is a security of a higher nature than the bond.

6 Co. 44 b.

But these cases must be understood where the debtor himself enters into these securities; and therefore, if a stranger give bond for a simple contract debt due by another, this does not extinguish the simple contract debt. But, if upon making the contract, a stranger gives bond for it, or being present, promises to give bond for it, and after does so, the debt by simple contract is extinguished, the obligation being made upon, or pursuant to the contract.

2 Leon. 110. § By the civil law the giving a new engagement for an old one is called a novation. The following is extracted from Bouv. L. D. *Novation*. "Novation is a substitution of a new debt for an old. The old debt is extinguished by the new one contracted in its stead; a novation may be made in three different ways, which form three distinct kinds of novations. The first takes place without the intervention of any new person, where a debtor contracts a new engagement with his creditor, in consideration of being liberated from the former. This kind has no appropriate name, and is called a novation generally. The second is that which takes place by the intervention of a new debtor, where another person becomes a debtor instead of a former debtor, and is accepted by the creditor, who thereupon discharges the first debtor. The person thus rendering himself debtor for another, who is in consequence discharged, is called *expromissor*; and this kind of novation is called *expromissio*. The third kind of novation takes place by the intervention of a new creditor, where a debtor, for the purpose of being discharged from his original creditor, by order of that creditor, contracts some obligation in favour of a new creditor. There is also a particular kind of novation called a delegation. Poth. Obl. pt. 3, c. 2, art. 1." See Bouv. L. D. *Delegation*.¶

## (D) Of the Extinguishment of Debts.

But the accepting of a security of an inferior nature is by no means an extinguishment of the first debt; as, if a bond be given in satisfaction of a judgment.

Cro. Ja. 649; Brownl. 29; Cro. Ja. 649, 650, like point adjudged, where it was pleaded, that an annuity was granted in discharge of a bond.

Also, the accepting of a security of equal degree is no extinguishment of the first debt; as, where an obligee has a second bond given to him; for one deed cannot determine the duty upon another.

Cro. Eliz. 304, 716, 727; Brownl. 74; Litt. Rep. 58; Cro. Car. 86; 1 Ld. Raym. 680; 1 Burr. 9.  $\beta$  A bond and warrant of attorney on which a judgment is entered, are not an extinguishment of a previous judgment against the same defendant. *Sternberg v. Shaffer*, 11 Johns. 513. See *Day v. Seal*, 14 Johns. 404; *Andrews v. Smith*, 9 Wend. 53; *Wakeman v. Lyon*, 9 Wend. 241; *Mumford v. Stocker*, 1 Cowen, 178; *Briggs v. Thompson*, 20 Johns. 284; *Wallace v. Agry*, 4 Mason, 336; *Wise v. Hilton*, 4 Greenl. 435; *Bower's Executors v. The State*, 7 Har. & J. 32. $\gamma$

Also, it is said to have been adjudged, that if the condition of an obligation be to pay 10*l.* at a day, which is not paid at the day, but after the day the obligee accepts a statute staple from the obligor for the same debt, in full satisfaction of the obligation; yet this is not any satisfaction; for though the statute be a matter of record, and higher than the obligation, yet the obligation remains in force, and the obligee hath his election to sue the one or the other.

6 Co. 44, *Braithet's case*, cited in *Higgen's case*; Ro. Abr. 470; Cro. Car. 86, S. C., cited.

If an infant becomes indebted for necessities, and the party takes bond of the infant; this shall not extinguish the simple contract; for the bond has no force.

Cro. Eliz. 920.

Debts are also said to be extinguished where a creditor makes his debtor executor; for in this case he cannot sue himself. But where such debts remain assets, vide tit. *Executors and Administrators*, letter (A).

Hob. 10; Ro. Abr. 920.  $\beta$  This proposition is laid down rather too broadly; in the United States the debt is generally not considered as *extinguished*, but the *remedy* is gone, and the money is considered in the hands of the executors as assets. Vide ante, *Executors and Administrators*, (A). $\gamma$

$\beta$  When one indebted to the estate of a lunatic by specialty is appointed committee of his estate, and the specialty is transferred to, and received by him as a committee, the debt is extinguished, and the sureties to his bond as committee are liable as for so much money received by him.

*Joyner v. Cooper*, 2 Bailey, 199. $\gamma$

So, where the obligor marries the obligee, this is said to be an extinguishment of the debt; for by the intermarriage they become one person, and cannot sue each other. But for this vide tit. *Baron and Feme*, letter (E).

$\beta$  A judgment without satisfaction, is not an extinguishment of a collateral remedy for the same cause of action.

*Chipman v. Martin*, 13 Johns. 240. See 1 Pet. C. C. R. 74.

A mortgage of lands as a security for a simple contract debt, though it contain a stipulation against personal liability on the mortgage, does not operate as a payment of the debt, nor discharge the mortgagor from personal liability for it.

*Ainslee v. Wilson*, 7 Cowen, 662.

Extortion.

A release or conveyance of the equity of redemption from the mortgagor to the mortgagee extinguishes the mortgage.

Jackson *ex dem.* Bruyn v. Dewitt, 6 Cowen, 316; James v. Morey, 2 Cowen, 286.

The officers of a church not incorporated, agreed to give their minister a stipulated salary; afterwards the church became incorporated, the minister being a party to the act of incorporation; on an action brought by the minister on his dismissal against the survivors who were parties to the original contract, it was held that the original contract was extinguished, and the corporation substituted for the defendants.

Van Vlienden v. Welles, 6 Johns. 85.

The arrest of a debtor on a *ca. sa.*, and a subsequent discharge from arrest, by defendant, extinguishes the judgment.

Ransom v. Keyes, 9 Cowen, 128; Lathrop v. Briggs, 8 Cowen, 171.

A judgment obtained against one of two joint debtors on simple contract, is an extinguishment of the claim against the others. (a) And a judgment in a state court is conclusive in every other state, and extinguishes the original cause of action. (b)

(a) Willings v. Consequa, 1 Pet. C. C. R. 302. (b) Green v. Sarmiento, 1 Pet. C. C. R. 74.

The official bond of a receiver of public moneys does not extinguish the simple contract debt arising from a balance of accounts due from him to the United States. (c) Nor does a bond given to secure payment of duties on imported goods extinguish the debt. (d)

(c) Walton v. the United States, 9 Wheat. 651. (d) United States v. Lyman, 1 Mason, 482; Meredith v. United States, 13 Pet.; but see United States v. Astley, 3 Wash. C. C. R. 508.

The acceptance of a specialty in satisfaction extinguishes a simple contract debt; and the latter is not revived, although the specialty be subsequently rendered void by an alteration in a material part.

Mills v. Starr, 2 Bailey, 359. *g*

EXTORTION.

EXTORTION is said by my Lord Coke to signify any oppression by colour or pretence of right, and in this respect it is said to be more heinous than robbery itself; as also, that it is usually attended with the aggravating sin of perjury.

Co. Litt. 368 b; 10 Co. 102 a; 1 Hawk. P. C. c. 68; Cro. Car. 438, 448; *β* People v. Whaley, 6 Cowen, 661. *g*

But in a strict sense it is defined, the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

Co. Litt. 368; 10 Co. 102.

By the common law, as also by the statute of Westm. 1, c. 26, it is declared

## Extortion.

and enacted to be extortion, for any sheriff or other minister of the king, whose office anyways concerns the administration or execution of justice, or the common good of the subject, to take any reward whatsoever, except what he receives from the king.

2 Inst. 209; Co. Litt. 368.

And this institution hath been thought so conducive to the good of the public, that all (a) prescriptions whatsoever, which have been contrary to it, have been holden to be void: as, where (b) the clerk of the market claimed certain fees as due time out of mind, for the examination of weights and measures; this was adjudged to be void.

(a) 43 E. 3, 4 b, 5 a; 2 Ro. Abr. 226. (b) Moore, 523; 2 Inst. 209; 4 Inst. 274.

But the stated and known fees allowed by the courts of justice to their respective officers for their labour and trouble, are not restrained by the common law, or by the said statute of Westm. 1, c. 26, and, therefore, such fees may be legally demanded and insisted upon, without any danger of extortion.

21 H. 7, 17; Co. Litt. 368.  $\beta$  An officer who receives the fees due for collecting money due on an execution, when in fact he did not collect it, the money having been paid by the defendant to the plaintiff, is guilty of extortion, although the execution was in his hands previous to the payment. *Cross v. the State*, 1 Yerger, 261. $\gamma$

And for this reason it is holden, that the fee of 20*d.*, called the bar-fee, taken time out of mind by the sheriff for every prisoner that is acquitted, and the fee of a penny claimed by the coroner for every *visne*, when he came before the justices in eyre, are not within this statute; as also because they are due of course as perquisites, whether any thing be done by such sheriff or coroner, or not.

21 H. 7, 17; 2 Inst. 176, 210; Staund. P. C. 49.

Also, it seems that an officer, who takes a reward which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *premium* it would be impossible in many cases to have the laws executed with vigour and success.

2 Inst. 210; 3 Inst. 149; Co. Litt. 368.  $\beta$  In most of the states a penalty is inflicted for taking other fees than those allowed by law. See *Dunlap v. Curtis*, 10 Mass. 210; *Commonwealth v. Cony*, 2 Mass. 523. $\gamma$

But it has been always holden, that a promise to pay an officer money for the doing of a thing which the law will not suffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made.

Ro. Abr. 16; Ro. Rep. 313; Noy, 76; Jon. 65; Cro. Eliz. 654; Moore, 468; Cro. Ja. 103; 2 Burr. 924; 1 Bl. Rep. 204;  $\beta$  *Preston v. Bacon*, 4 Conn. 471. $\gamma$

{ And therefore the taking of a promissory note for fees not due, will not support an indictment for extortion, if it does not appear that the note was paid. To constitute extortion, there must be the receipt of money or of some other thing of value. But the note, being void, was of no value.

2 Mass. T. Rep. 523, *Commonwealth v. Cony*. }

This offence of extortion is punishable at common law by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed; and there is a farther additional punishment by the statute of Westm. 1, c. 26, with regard to the persons to which the statute extends, by which it is enacted, "That no sheriff nor other king's officer shall take any reward

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to do his office, but shall be paid of that which they take of the king; and that he who so doth shall yield twice as much, and shall be punished at the king's pleasure."

2 Ro. Abr. 32, 33, 57; Raym. 315; 2 Inst. 209.

If an indictment of extortion charges J S with the taking of 50s. as bailiff of a hundred, *colore officii*, without (a) showing for what he took it; this is good, at least after verdict; for perhaps he might claim it generally, as being due to him as bailiff, in which case the taking could not be otherwise expressed.

Sid. 91, *Rex v. Cover*. β In an indictment against an attorney for extorting more than legal fees, the offence should be stated with sufficient precision and certainty; it must state the excess particularly, how much was received on his own account, and how much for the officers of the court. *People v. Rust*, 1 Caines, R. 130. γ (a) An information for extortion must set forth the time when the offence was committed. *Rex v. Roberts*, 4 Mod. 101, 103.——The Court of King's Bench will not quash an indictment for extortion or oppression, though erroneous, but oblige the party to plead or demur to it. *Rex v. Wadsworth*, 5 Mod. 13.——If the chancellor and registrar of a diocese compel an executor to prove a will in the bishop's court, knowing it had been proved in the Prerogative, and take fees, this is extortion at the common law. *Rex v. Loggen*. Stra. 73.——If a bailiff bargains for money to be paid him by A, to accept A and B as bail for C, whom he has arrested, this is extortion at the common law. *Stotesbury v. Smith*, 2 Burr. 924; 1 Bl. Rep. 204, S. C.——As to fees.—A receiver of fee-farm rents can only take 4*d.* for one acquittance, (though for several years,) and if the party brings the acquittance ready written, he must sign it *gratis*; and if the party tenders his rent, and refuses to pay for the acquittance, the receiver cannot distrain for both. *Roberts v. Middleton*, Bunb. 348.

β A summons was issued by a justice, returnable at 10 A. M., when the defendant appeared and waited till 12 o'clock, when the justice told him that he (the justice) must tax the plaintiff with the costs, and then the defendant departed, but instead of doing this, the justice afterwards adjourned the cause to another day, and then gave judgment as upon a summons with costs; afterward the defendant paid the justice the amount of the note on which suit was brought, but refused to pay the costs, which the justice demanded, and he paid the justice twelve and a half cents; held that this was extortion in the justice.

*People v. Whaley*, 6 Cowen, 661.

No officer of the government has a right by colour of his office to require from a subordinate officer as a condition of his holding his office, that he should execute a bond with a condition different from that prescribed by law.

*United States v. Tingey*, 5 Pet. 115. γ

## FAIRS AND MARKETS.

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- (A) Of the Right to a Fair or Market: And herein,
    - 1. *How a Right to a Fair or Market must commence.*
    - 2. *Of the Owner's Remedy for a Disturbance in the Enjoyment of them.*
  - (B) Of the Manner of holding Fairs and Markets: And herein,
    - 1. *In what Place they are to be holden.*
    - 2. *At what Time they are to be holden.*
    - 3. *How long to continue.*
  - (C) Of the Duty and Power of Owners of Fairs and Markets in Things incident to them.
  - (D) Of the Toll and other Duties which Owners of Fairs and Markets are entitled to: And herein,
    - 1. *Where such Tolls, &c., shall be said to be reasonable and legally due.*
    - 2. *What Persons are exempt from Payment thereof.*
  - (E) How far a Sale in a Fair or Market-overt changes the Property of a thing sold therein.
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### (A) Of the Right to a Fair or Market: And herein,

#### 1. *How a Right to a Fair or Market must commence.*

THE first institution of fairs and markets seems plainly to be for the better regulation of trade and commerce, and that merchants and traders may be furnished with such commodities as they want at (a) a particular mart, without that trouble and loss of time which must necessarily attend travelling about from place to place; and therefore, as this is a matter of universal concern to the commonwealth, so it hath always been holden, that no person can claim a fair or market, unless it be by grant from the king, or by prescription, which supposes such a grant.(b)

2 Inst. 220. (a) Vide the 1 and 2 P. and M. c. 7, which assigns the reason of the decay of trade in cities and towns, to persons not selling their goods in fairs and markets, and enacts, that all country people shall sell in some open market, &c. But it does not prohibit inhabitants of one market town to sell in another. *Davis v. Leving*, 2 Lev. 89; *Lee v. White*, Dougl. 259. (b) [The reason why a fair or market cannot be otherwise claimed, is not merely for the sake of promoting traffic and commerce; but also, for the like reason as in the Roman law; for the preservation of order, and prevention of irregular behaviour. "*Jus Nundinarum oritur a principe, quia ubi est multitudo, ibi debet esse rector.*" *Per Wilmot, J.*, 3 Burr. 1812; 1 Bl. Rep. 580. Vide l. 1, *C. de nund.* l. 1 *C. de nund. et mercat.*]

And therefore if any person sets up any such fair or market without the king's authority, a *quo warranto* lies against him, and the persons who frequent such fair, &c., may be punished by fine to the king.

3 Mod. 127; *Sed vide R. v. Marsden*, 3 Burr. 1812; 1 Bl. Rep. 579.

Also it seems, that if the king grants a patent for holding a fair or market, without a writ *ad quod damnum* executed and returned, that the same may be repealed by(c) *scire facias*; for though such fairs and markets are a benefit to the commonwealth, yet too great a number of them may become nui-

(A) Of the Right to a Fair or Market.

sances to the public, as well as a detriment to those who have more ancient grants.

3 Lev. 222. (c) Or by assize of nuisance, *quod permittat*, &c., as well as by *scire facias*, for which vide Dyer, 197, 276; 2 Inst. 406.

So, where a writ of *ad quod damnum* is deceitfully executed; as where J S, intending to get a patent for a market every Tuesday in Chatham, which is within a mile and a half of Rochester, in which there is a market every Wednesday and Friday, took out a writ of *ad quod damnum*, which was executed the same day it bore *teste*, and thirty miles from Rochester, without notice to the mayor, &c., of Rochester; the patent obtained thereupon was repealed by *scire facias*.

3 Lev. 220, 221; the King v. Sir Oliver Butler, 2 Vent. 344, S. C.

2. Of the Owner's Remedy for a Disturbance in the Enjoyment of them.

It seems clearly agreed, that if a person hath a right to a fair or market, and another erects a fair or market so near his, that it becomes a nuisance to his fair, &c., that for this detriment and injury done him, an action on the case lies; for it is implied in the (a) king's grant, that it shall be no prejudice to another.

¶ See an admirable chapter on this subject in Bract. lib. iv. c. 46, § 100, and the very words of Bracton in Fleta, lib. iv. c. 28, § 13, 14; 22 H. 6, 14 b; 41 E. 3, 24 b; 2 Ro. Abr. 140. (a) Where a patent is granted to the prejudice of the subject, the king of right is to permit him, upon his petition, to use his name for the repeal of it in a *scire facias* at the king's suit, to hinder multiplicity of actions upon the case. 2 Vent. 344. ¶ And indeed it has been holden, that the person prejudiced by the patent may, upon the enrolment of it in Chancery, have a *scire facias* to repeal it, as well as the king. Brewster v. Weld, 6 Mod. 229; Reg. v. Aires, 10 Mod. 258, 354, S. P.¶

Also, although the new market be holden on a different day, yet an action on the case lies; for this, by forestalling the ancient market, may be a greater injury to the owner than if holden on the same day with his.

2 Saund. 172, Yard v. Ford, adjudged; Mod. 69, S. C.; 10 Mod. 258, 354.

If a man hath a fair or market, and a stranger disturbs those who are coming to buy or sell there, by which he loses his toll, or receives some (b) prejudice in the profits arising from his fair, &c., an action on the case lies.

Ro. Abr. 106; 2 Vent. 26, 28, S. C. cited, and admitted to be law. (b) In case, the plaintiff declared, that he was lord of the manor of, &c., and had a market, &c., and that all butchers, &c., ought to sell in the high street upon the stalls of the plaintiff, paying 1d.; and that the defendant was a butcher, and sold, &c., in his own house *occultè*; and the defendant pleaded, that he was an householder, and that time out of mind every householder in, &c., had used to sell, &c., in his own house. 8 Co. 127, cited, and held no good plea.

So, if upon a sale in a fair a stranger disturbs the lord in taking the toll, an action upon the case lies.

9 H. 6, 45; Ro. Abr. 106, S. C.

¶ Where a grantee of a market, under letters patent from the crown, suffered another to erect a market in his neighbourhood, and to use it for the space of twenty-three years without interruption, it was adjudged, that such uses operated as a bar to an action on the case, for a disturbance of his market. Such a length of possession was considered by Eyre, C. J., of C. B., who tried the cause, not as evidence to the jury, from which they might presume a grant of a market to the defendant, prior to the plaintiff's grant, but as a complete answer, or bar (c) to the action. he therefore non-

## (B) Of the Manner of holding Fairs and Markets.

suitied the plaintiff; and the court, on a motion to set aside the nonsuit, were clearly of the same opinion.

*Holcroft v. Heel*, 1 Bos. & Pull. (c) But in *Campbell v. Wilson*, 3 East, 298, *Le Blanc, J.*, who had been counsel for the plaintiff in *Holcroft v. Heel*, said that the ground on which that case went off was, that the court having intimated their opinion, that if the case went down to trial again upon the same facts, it would be left to the jury to find for the defendant, upon the ground of presumption of a grant after twenty-three years' uninterrupted uses of the market: the plaintiff's counsel said, that if it were to be left to the jury in that manner, with the recommendation of the court in favour of such a presumption, it would answer no purpose to go to trial again.¶

## (B) Of the Manner of holding Fairs and Markets: And herein,

1. *In what Place they are to be holden.*

THE king is the sole judge where fairs and markets ought to be kept; and therefore it is said, that if he grants a market to be kept in such a place, which happens not to be convenient for the country, yet the subjects can go to no other; and if they do, the owner of the soil where they meet is liable to an action at the suit of the grantee of the market.

3 Mod. 127. See 2 Ro. Abr. 140.

But, if no place be limited for keeping a fair by the king's grant, the grantees may keep it where they please, or rather where they can most conveniently; and if it be so limited, they may keep it in what part of such place they will.

*Dixon v. Robinson*, 3 Mod. 108, said by Ch. Just. So, *Curwen v. Salkeld*, 3 East, 538; *Rex v. Cotterill*, 1 Selw. & Barnw. 67.

By the 13 E. 1, c. 5, "No fairs or markets shall be kept in churchyards."

2. *At what Time they are to be holden.*

By the 27 H. 6, c. 5, Fairs and markets on the principal feasts, viz., Ascension-day, Corpus-Christi-day, Whitsunday, Trinity-Sunday, and all other Sundays, the Assumption of our Lady, All-Saints, and Good-Friday, shall cease from all showing of goods and merchandises, necessary victuals only excepted; upon pain of forfeiture of their goods showed, the four Sundays in harvest excepted; and the fairs or markets, which are granted to be holden on these festivals, may be holden within three days before or after.

¶ See the Petition of the Commons, Rot. Parl. 27 H. 6, vol. v. p. 152, No. vi. This is the first legislative enactment to enforce a due observance of the Lord's Day which is to be met with since the Conquest. The long and laboured preamble; the extreme anxiety discoverable in the body of the act to protect the interests of those who might be prejudiced by the prohibition, and to that end altering the course of prescriptions; the exception of the four Sundays in harvest; the postponement of the operation of the act to a distant day; and the covered manner in which the crown perpetuates it, *ad proximum parliamentum, et sic deinde, nisi, &c.*; all these singularities and provisions show that the measure was considered as bold and hazardous. The church had at different times made some efforts to suppress this practice, but without any permanent effect; *veruntamen tempore procedente, plerique ut canes ad vomitum sunt reversi*, are the words of M. Paris, after having spoken of an attempt of this sort. Hist. sub anno 1200.¶ See the statute 1 Car. 1, c. 1, and 29 Car. 2, c. 7.

3. *How long to continue.*

By the 2 E. 3, c. 15, it is established, "That it shall be commanded to all the sheriffs of England, and elsewhere, where need shall require, to cry and publish, within liberties and without, that all the lords which have fairs,



(C) Of the Duty and Power of Owners of Fairs, &c.

be it for yielding certain fernn for the same to the king, or otherwise, shall hold the same for the time they ought to hold it, and no longer, that is to say, such as have them by the king's charter granted them, for the time limited by the said charters; and also they that have them without charter, for the time that they ought to hold them of right; and that every lord, at the beginning of his fair, do cry, and publish therein, how long the fair shall endure, to the intent that merchants shall not be at the same fairs over the time so published; upon pain to be grievously punished towards the king; nor the said lords shall not hold them over the due time, upon pain to seize the fairs into the king's hands, there to remain till they have made a fine to the king for the offence, after it be duly found, that the lords held the same fairs longer than they ought, or that the merchants have continued above the time so cried and published."

And by the 5 E. 3, c. 5, reciting, that by the above-mentioned statute, 2 E. 3, called the statute of Northampton, there is no certain punishment ordained against the merchants if they sell after the time, it is accorded, "That the said merchants, after the said time, shall close their booths and stalls, without putting any manner of ware or merchandise to sell there; and if it be found that any merchant from henceforth sell any ware or merchandise at the said fairs, after the said time, such merchant shall forfeit to our lord the king the double value of that which is sold, and to that end every man that will sue for our lord the king shall be received, and also have the fourth part of that which shall be lost at his suit."

(C) Of the Duty and Power of Owners of Fairs and Markets in Things incident to them.

If the king grants unto one a fair or market, he shall have, without any words to that purpose, a court of record, called a court of (a) pie-powders, as incident thereunto, for that is for advancement and expedition of justice, and for the supporting and maintenance of the fair or market.

2 Inst. 220. (a) That it is as well incident to a fair as to a market, but there may be a court of pie-powders by custom, without a fair or market, as there may be a market without an owner. 4 Inst. 272.—For the jurisdiction of this court, vide under tit. *Courts and their Jurisdiction in general*.

Owners and governors of fairs are to take care that every thing be sold according to just(b) weight and measure, who for that and other purposes may appoint a clerk of the fair or market, who is to mark and allow all such weights, and for his duty herein can only take his reasonable and just(c) fees.

(b) That according to *Magna Charta*, c. 25, there shall be but one weight and one measure of corn, wine, beer, and ale, and one yard throughout the whole realm; but for the several statutes regulating weights and measures, vide 14 E. 3, c. 12; 25 E. 3, c. 10; 27 E. 3, c. 10; 34 E. 3, c. 5; 13 Rich. 2, c. 9; 8 H. 6, c. 5; 7 H. 7, c. 4; 11 H. 7, c. 4; 12 H. 7, c. 5; the statute called 17 Car. 1, c. 19, and 22 Car. 2, c. 8, and vide Balt. Just. c. 112. (c) For this vide 4 Inst. 274; Moore, 523.

Fairs and markets are such franchises as may be forfeited; as, if the owner of them hold them contrary to their charter, as by continuing them a longer time than the charter admits, by disuser, and by extorting fee and duties where none are due, or more than are justly due.

2 Inst. 220; Finch. 164; 3 Mod. 108; 10 Mod. 355.

¶It is the duty of the grantee of a market to take care that proper space and accommodation are provided within a market for the purposes of buyers and sellers resorting to it; and if he suffer parts of the market to be appro-

## (D) Of Toll and other Duties, &amp;c.

priated to other uses, so as not to leave such accommodation, he cannot sue a party for selling goods without the market and near it.

Prince v. Lewis, 5 Barn. & C. 363; and see Mosley v. Walker, 7 Barn. & C. 40.]]

(D) Of Toll and other Duties which Owners of Fairs and Markets are entitled to:  
And herein,1. *Where such Tolls shall be said to be reasonable and legally due.*

(a) TOLL payable at a fair or market is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the fair or market, or for stallage, piccage, or the like.

2 Inst. 222; 2 Jon. 207. (a) Toll is a general word, which comprehends all duties and payments at a fair or market, and therefore a grant to be discharged of toll discharges a man from piccage and stallage. Palm. 78; 2 Lutw. 1519.—Piccage is a sum of money paid for leave to dig the ground to erect a stall. Palm. 77.—Stallage is a sum of money paid for leave to erect a stall, or to remove a stall from one part of the fair to another. Palm. 77. [But piccage and stallage seem rather improperly called *tolls*. Toll can only be due by grant, custom, or prescription: it is not incident of common right to a fair; it will not pass under general words in a grant of a new fair, for custom will not support it in such a fair. Holloway v. Smith, 2 Str. 1171. It is certain and payable only on a sale, unless by special custom, by the buyer; but piccage and stallage are uncertain, payable whether the goods are sold or not, and the owner of the soil is entitled to them of common right. These are paid as a satisfaction for the use of the soil: toll, properly so called, goes only, though not necessarily, with the right of market; but the right of market and the right of soil are things totally distinct. Stallage and piccage go with the soil to the youngest son where it is borough-english, whilst the market descends to the heir at common law. || Heddy v. Welhouse, Moore, 474; Mayor of Northampton v. Ward, 1 Wils. 115; 2 Str. 1238, S. C.; 2 Inst. 220. Trespass, therefore, will lie at the suit of the owner of the soil against any one who erects a stall without his license; Mayor of Northampton v. Ward, 1 Wils. 107; 2 Str. 1238, S. C.; Mayor of Norwich v. Swan, 2 Bl. Rep. 1116; but he cannot, in such case, distrain the goods, as damage-feasant. The Mayor of Launceston's case, Cr. El. 75; Sawyer v. Wilkinson, Ibid. 627; Wigley v. Peachy, 2 Ld. Raym. 1589; Austin v. Whiffred, Willes's Rep. 623.]]

Toll is a matter of private benefit to the owner of the fair or market, and not incident to it; therefore, if the king grants a fair or market, and grants no toll, the patentee can have none, and such fair or market is counted a free fair or market.

Hoddy v. Wheelhouse, Cro. Eliz. 558; Moore, 474, S. C.; 2 Inst. 220, S. P.; Anon. 7 Mod. 12; Holloway v. Smith, 2 Str. 1171.

Also, if the king, at the time he grants a fair or market, grants a toll, and the same is (b) outrageous and excessive, the grant of the toll is void, and the same becomes a free fair or market.

2 Inst. 220. (b) That the reasonableness of every toll must be determined by the discretion of the judge. 2 Inst. 222.

But the king, after he has granted a fair or market, may grant that the patentee may have a reasonable toll. But this must be in consideration of some benefit accruing from it to those who trade and merchandise in such fair or market.

2 Inst. 221.

No toll shall be paid for any thing brought to the fair or market before the same is sold, unless it be by custom time out of mind, and upon such sale the toll is to be paid by the buyer; and therefore my Lord Coke says, that a fair or market by prescription is better than one by grant.

2 Inst. 221; Leight v. Pym, 2 Lutw. 1336.

And by Westm. 1, c. 31, touching them that take outrageous toll, contrary to the common custom of the realm in market-towns, it is provided, "That if any do so in the king's town, which is let in fee-farm, the king shall (a) seize into his own hand the franchise of the market; and if it be another's town, and the same be done by the lord of the town, the king shall do in like manner; and if it be done by a bailiff or any mean officer, without the commandment of his lord, he shall restore to the plaintiff as much more, for the outrageous taking, as he had of him, if he had carried away his toll, and shall have forty days' imprisonment."

(a) This must be intended upon office found. 2 Inst. 221.

But where by custom a toll is due upon the sale of any goods in a fair or market, and he who ought to pay it refuses, (b) an action on the case lies against him. [And this is the proper remedy where goods are fraudulently sold out of the market to avoid the tolls; for in such case there can be no distress.]

Ro. Abr. 103, 104, 106; Blackey v. Dinsdale, Cowp. 661. (b) Vide 3 Lev. 400. Toll is *quasi* a debt, for which debt or an *assumpsit* lies. [A claim of toll in specie for goods sold in a market is supported, it seems, by evidence of a right to toll for goods brought into the market, and there sold; without showing any right to toll for goods sold in the market, but not brought there. Moseley v. Pierson, 4 T. R. 104.]

|| So, if a man sells goods by sample in a market, and refuses to pay the toll which he would have been liable to, had he sold them there in bulk, an action on the case lies against him for the injury to the market; for he has a benefit from the market, and therefore ought to pay the duties of it. But such an action will not lie against the buyer, for the mere act of buying by sample that which he knew at the time was not in the market. To support the action against him, actual fraud, or collusion with the seller to defraud the owner of the market of his toll, must be alleged and proved.

Moseley v. Pierson, 4 T. R. 104; The Bailiffs, &c., of Tewkesbury v. Bricknell, 2 Taunt. 120; The Bailiffs, &c., of Tewkesbury v. Diston, 6 East, 438.

The king cannot grant a toll of things not brought into the market; and therefore a prescription for toll in respect of goods sold by sample in a market, though afterwards brought into the city to be delivered, cannot be supported.

Kerby v. Whichelow, 2 Lutw. 1502, per Powell, J.; Hill v. Smith, 4 Taunt. 520; reversing the judgment of B. R., 10 East, 476.||

Where a corporation were entitled to toll on all goods passing in and out of their city, at the rate of one penny for every horse-load, two pence for every cart-load drawn by one horse, and two pence more for every additional horse; it was held that any alteration of the carriage, as by taking them in stage-coaches instead of wagons or carts, could not vary the right of toll in proportion of two pence for each horse, although the number of horses was proportioned to the weight of passengers rather than of goods.

Mayor of Carlisle v. Wilson, 5 East, R. 2.

Where an act of parliament recited the original grant of a market, and that it was expedient provision should be made for the better regulating it, and for the more easy collection of tolls, &c., enacted that it should be lawful for the owner of the market to take from all persons who should pitch or expose to sale any fruits, &c., such tolls as were usually collected and taken within the market, it was held that the owner, though not entitled at common law to any toll, might under this clause recover such tolls as a

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the passing of the act were usually paid in any part of the market, and that although the tolls usually paid in respect of the same articles, were different in different parts of the market.

The Duke of Bedford v. Emmett, 3 Barn. & A. 366; and see 2 Moo. 102.

A prescription for toll of corn brought into a town on market-day, whereof any part shall be pitched in the market and sold, is bad, since there cannot be any toll in respect of goods not actually brought into the market.

Wells v. Miles, 4 Barn. & A. 559.

A plea by a lord of a manor, setting out burdens borne by him, and then prescribing, not by reason of those burdens, but generally as lord of the manor, for a toll on all goods bought and delivered, or bought elsewhere and brought into and delivered in a town within the manor which from time immemorial had been parcel of the manor, was held good after verdict for the defendant, as a claim of toll traverse, although the burdens set out did not constitute a sufficient consideration for a toll thorough.

Rickards v. Bennett, 1 Barn. & C. 223.

### 2. *What Persons are exempt from payment of Toll.*

If the king or any of his progenitors have granted to any one to be discharged of toll, either generally or specially; this grant is good to discharge him of all tolls to the king's own fairs or markets, and of the tolls which, together with any fair or market, have been granted after such grant or discharge; but cannot discharge tolls formerly due to subjects either by grant or prescription.

2 Inst. 221. For the writ to be quit of toll, vide F. N. B. 503; and vide 2 Show. 34, pl. 26.

Also, the king himself shall not pay toll for any of his goods; and if any be taken, it is punishable within the statute Westm. 1, c. 31.

2 Inst. 221.

So, tenants in ancient demesne are free and quit from all manner of tolls in fairs and markets, whether such tenants hold in fee, for life, years, or at will.

4 Inst. 269; 2 Inst. 221; Ro. Abr. 321.

But this privilege does not extend to him who is a merchant, and gets his living by buying and selling, but is annexed to the person in respect of the land, and to those things which grow, and are the produce of the land.

F. N. B. 228; 2 Leon. 191; Cro. Eliz. 227; 2 Inst. 221; Ro. Abr. 321, 322.— And how this exemption must be set forth in pleading, vide 2 Lutw. 1144.

(E) How far a Sale in a Fair or Market-overt changes the Property of a Thing sold therein.

For the encouragement of trade, and to render contracts in fairs and markets secure, by the common law, every sale made in a (a) fair or (b) market-overt transfers a complete property in the thing sold to the vendee; so that however injurious or illegal the title of the vendor may be, yet the vendee's is good against all men.

4 H. 7, 5, pl. 1; Latch. 144; 2 Inst. 713. (a) That the law is now settled, that a sale in a fair where no toll is paid, is as effectual to change the property as in any other. 2 Inst. 714. (b) The city of London is a market-overt every day in the week, except

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Sundays, so that a sale on any of those days has the same effect as if on a fair or market-day in another place. 2 Inst. 713; Moore, 360, S. P.; 2 Brownl. 288; Godb. 131; 8 Co. 127 a, S. P. [And in London every shop, in which goods are exposed publicly to sale, is market-overt, for such things as the owner professeth to trade in; but in the country, the market-overt is confined to the particular place or spot of ground set apart by custom for the sale of particular goods. See cases *supra*, 2 Bl. Comm. 449. However, where the transaction is perfectly fair on the part of the vendee, though the dealing is out of the precincts of London, great allowances shall be made in analogy to the above mentioned customs. Therefore, it seems, the property of goods may be changed, and effectually transferred to the buyer, by a *bona fide* sale, in a shop out of London, and that whether the shopkeeper is the vendor or vendee, if the goods are of the kind in which he trades. Harris v. Shaw, Ca. temp. Hardw. 349. But the custom of London doth not extend to the case of a pawn. Hartop v. Hoare, 3 Atk. 44; 1 Wils. 8, S. C.; 2 Str. 1187, S. C.]

But this general rule, that a sale in a market changes the property, must be understood with the following restrictions:

1. That this sale in a market-overt shall not bind the king, although it bindeth all others, as infants, feme coverts, idiots or lunatics, men beyond sea, or in prison, and whether they were possessed of them in their own right, or as executors or administrators.

2 Inst. 713.

2. That though all fairs and markets are overt, yet the sale must be in some open place, as in a shop, and not in a warehouse or other private part of the house, so that people who go along may see what is a-doing; and therefore if the shop-door or windows be so shut that the goods cannot be seen, this alters no property.

5 Co. 83, Bishop of Worcester's case; And. 344, S. C. and S. P.; Moore, 360, S. C. and S. P.; Poph. 84, S. C. and S. P.; Cro. Eliz. 454, S. P.; 8 Co. 127, S. P.

3. The things bought must be of the nature and quality of those which the buyer deals in, and therefore if plate, &c., are bought in (a) a scrivener's shop in London, this alters no property, and the true owner may maintain trover for them.

5 Co. 83. Case of market-overt determined at the Old Bailey, by Popham, Egerton, Anderson, Brian, and others. Poph. 84, S. C. and S. P.; Cro. Eliz. 454, S. C. and S. P., by the name of the Bishop of Worcester's case; And. 344, S. C. and S. P.; Moore, 360, S. C. and S. P.; and there said that the law is the same, if horses are sold in Cheapside, or shop goods in Smithfield. Cro. Ja. 68, 69, Taylor and Chamber, S. P. adjudged. || A wharf, even in London, cannot be considered as a market-overt for articles brought there: and a sale by the wharfinger, without the authority of the owner, of goods lying there to a purchaser, who duly pays for them, will not change the property. Wilkinson v. King, 2 Campb. N. P. C. 335. || (d) And by the 1 Ja. 1, c. 21, it is enacted, that no sale, exchange, pawn, or mortgage of any jewels, plate, apparel, household stuff, or other goods of what kind, nature, or quality soever the same shall be, and that shall be wrongfully or unjustly purloined, taken, robbed, or stolen from any person or persons, or bodies politic, and which at any time hereafter shall be sold, uttered, delivered, exchanged, pawned, or done away within the city of London or liberties thereof, or within the city of Westminster, in the county of Middlesex, or within Southwark, in the county of Surry, or within two miles of the said city of London, to any broker or brokers, or pawn-takers, by any ways or means whatsoever, directly or indirectly, shall work or make any change or alteration of the property or interest of and from any person and persons, or body politic, from whom the same jewels, plate, apparel, household-stuff, or goods were or shall be wrongfully purloined, taken, robbed, or stolen. Vide *supra*, *Bailment*, (B). || In trover against a pawnbroker for goods pledged with him, it appeared that the goods had been stolen from the plaintiff's house, and had been pawned by a woman, who had been tried for the felony, but acquitted on the absence of a material witness. Lord Ellenborough held that the action well lay, and the plaintiff had a verdict. Parker v. Gillies, 2 Camp. N. P. C. 336, notes. ||

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4. The goods must be sold, and a valuable consideration actually paid for them.

2 Inst. 713.

5. If the buyer knows at the time of the sale that the vender hath not the absolute property; this will not bar the right owner.

2 Inst. 713; 2 And. 115; and 3 Co. 78 b, S. P.

6. The sale must be without covin, or any combination between the buyer and seller to defraud the true owner.

2 Inst. 713; 2 And. 315; and 3 Co. 78 b, S. P.

7. If a sale be made of goods by a stranger in a market-overt, whereby the right of A is bound; yet if the seller acquire the goods again, A may take them again, because the seller was the wrongdoer, and he shall not take advantage of his own wrong.

2 Inst. 713.

8. There must be a sale and contract, and therefore a sale to a man of his own goods in market-overt bindeth not; and likewise a sale in market-overt by an infant of such tenderness of age, as it may appear to the buyer that he is within age, or by a feme covert, if the buyer know her to be a feme covert, unless for such things as she usually trades for or by the consent of her husband, bindeth not.

2 Inst. 713; Perk. § 93.

9. The contract must be originally and wholly made in the market-overt, and not have the inception out of the market, and the consummation in the market.

2 Inst. 713, 714; 4 Taunt. 533.

10. The sale must not be in the night, but between sunrising and sunset; though a sale made in the night is good to bind the parties, but not a stranger.

2 Inst. 714.

Here also we must observe, that at common law there was no restitution of goods stolen on any prosecution whatsoever, except on an (a) appeal of larceny; but to remedy this inconveniency, and to encourage the prosecuting of felons,

By the 21 H. 8, c. 11, it is enacted, "That if any felon or felons do rob, or take away any money, goods, or chattels, from any of the king's subjects, from their persons, or otherwise within this realm, and thereof the said felon or felons be indicted, and after arraigned of the same felony, and found guilty thereof, or otherwise attainted, by reason of evidence given by the party so robbed, or owner of the said money, goods, or chattels, or by any other by their procurement, that then the party so robbed, or owner, shall be restored to his said money, goods, and chattels, and that as well the justices of jail-delivery, as other justices afore whom any such felon or felons shall be found guilty, or otherwise attainted, by reason of evidence given by the party so robbed, or owner, or by any other by their procurement, have power by the said act to award from time to time writs (b) of restitution for the said money, goods, and chattels, in like manner as though any such felon or felons were attainted at the suit of the party in appeal.

4 H. 7, 5; Fitz. Coron. 62, 460; Staundf. P. C. 66; Hale's P. C. 212; Latch. 144.  
(a) For this vide 2 Hawk. P. C. c. 23, § 53. Harris v. Shaw, Ca. Temp. Hardw. 349.  
(b) [There hath been no writ of restitution sued out these 200 years.]

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Since this statute it hath been the practice to restore the goods stolen, upon the conviction of the offender, to the prosecutor of the indictment, notwithstanding any sale of them in a market-overt; but he can be restored to no goods but those mentioned in the indictment.(a)

Kelynge, 35, 48; 2 Inst. 714. (a) [If the goods are produced at the trial, and not restored, the owner may recover them by action of trover. Loft. 88. And though they should not be the very *identical* goods stolen, yet if they are the produce of those goods, the prosecutor is entitled to them. *Ibid.* Noy, 128; Cro. El. 661. But, if stolen goods before conviction of the felon, be sold *bonâ fide* in market-overt, the property is thereby changed; and though conviction reverts the original ownership, and the owner has a right to restitution if he can find the possessor, and ascertain the specific articles, yet he cannot maintain trover against one who was not in possession of them at the time of the conviction. Harwood v. Smith, 2 T. R. 750.]

As to changing the property of horses by a sale in a fair or market-overt, the same is provided against by the 2 & 3 P. & M. c. 7, and 31 Eliz.

But more especially by the 31 Eliz. c. 12, by which it is enacted, "That no person shall, in any fair or market, sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, unless the toll-taker there, or, (where no toll-taker is paid,) the book-keeper, bailiff, or the chief officer of the same fair or market, shall and will take upon him perfect knowledge of the person that so shall sell, or offer to sell, give or exchange any horse, &c., and of his true Christian name, surname, and place of dwelling or resiancy, and shall enter all the same his knowledge in a book there kept for sale of horses, or else that he so selling or offering to sell, give, exchange, or put away any horse, &c., shall bring unto the toll-taker, or other officer aforesaid, of the same fair or market, one sufficient and credible person, that can, shall, or will testify and declare unto, and before such toll-taker, book-keeper, or other office, that he knoweth the party that so selleth, giveth, exchangeth, or putteth away such horse, &c., and his true name, surname, mystery, and dwelling-place, and there enter, or cause to be entered in the book of the said toll-taker, or officer, as well the true Christian name, surname, mystery, and place of dwelling or resiancy of him that so selleth, giveth, exchangeth, or putteth away such horse, &c., as of (b) him that so shall testify or avouch his knowledge of the same person, and shall also cause to be entered the very true price or value that he shall have for the same horse, &c., and that no person shall take upon him to avouch, testify, or declare, that he knoweth the party that so shall offer to sell, give, exchange, or put away such horse, &c., unless he do indeed truly know the same party and shall truly declare to the toll-taker or other officer, as well the Christian name, surname, mystery, and place of dwelling and resiancy of himself, as of him, of and for whom he maketh such testimony and avouchment; and that no toll-taker, or other person keeping any book of sales of horses in fairs or markets, shall take or receive any toll, or make entry of any sale, gift, exchange, or putting away of any horse, &c., unless he knoweth the party that so selleth, giveth, exchangeth, or putteth away any such horse, &c., and his true Christian name, surname, mystery, and place of his dwelling or resiancy, or the party that shall and will testify and avouch his knowledge of the same person so selling, &c., any such horse, &c., and his true Christian name, &c., and shall make a perfect entry into the sale book, of such his knowledge of the person and of the name, &c., and also the true price or value that shall be *bonâ fide* taken or had for any such

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horse, &c., so sold, given, &c., so far as he can understand the same; and then give to the party so buying, &c., such horse, &c., requiring, and paying two pence for the same, a true and perfect note in writing, of all the full contents of the same, subscribed with his hand, on pain that every person that so shall sell, &c., any horse, &c., without being known to the toll-taker, or other officer, or without bringing such a voucher or witness, causing the same to be entered as aforesaid, and every toll-taker, book-keeper, or other officer of fair or market offending in the premises, contrary to the true meaning aforesaid, shall forfeit, for every such default, the sum of 5*l.*; but also that every sale, gift, &c., of any horse, &c., not used in all points according to the true meaning aforesaid, shall be void; the one half of all which forfeiture to be to the queen's majesty, her heirs and successors, and the other half to him or them that will sue for the same."

(b) For this vide Palm. 484; Jon. 163.

And by § 4, it is enacted, "That if any horse, &c., shall be stolen, and afterwards shall be sold in open fair or market, and the same sale shall be used in all points and circumstances as aforesaid, that yet nevertheless the sale of any such horse, &c., within six months next after the felony done, shall not take away the property of the owner from whom the same was stolen, so as claim be made within six months by the party from whom the same was stolen, or by his executors or administrators, or by any other by any of their appointment, at or in the town or parish where the same horse, &c., shall be found, before the mayor or other head officer of the same town or parish, if the same horse, &c., happen to be found, in any town corporate or market town, or else before any justice of peace of that county near to the place where such horse, &c., shall be found, if it be out of a town corporate or market town; and so as proof be made within forty days then next ensuing, by two sufficient witnesses to be produced and deposed before such head officer or justice, (who by virtue of this act shall have authority to minister an oath in that behalf,) that the property of the same horse, &c., so claimed, was in the party, by or from whom such claim is made, and was stolen from him within six months next before such claim of any such horse, &c., but that the party from whom the said horse, &c., was stolen, his executors or administrators, shall and may, at all times after, notwithstanding any such sale or sales in any fair or open market thereof made, have property and power to have, take again, and enjoy the said horse, &c., upon payment, or readiness, or offer to pay the party, that shall have the possession and interest of the said horse, &c., if he will receive and accept it, so much money as the same party shall depose and swear before such head officer or justice of peace, (who by virtue of this act shall have authority to minister, and give an oath in that behalf,) that he paid for the same *bonâ fide*, without fraud or collusion."



## FEES.

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FEES are certain perquisites allowed to officers who have to do with the administration of justice, as a recompense for their labour and trouble ; and these are either ascertained by acts of parliament, or established by ancient usage, which gives them an equal sanction with an act of parliament.

Of those there are several kinds ; but we shall only consider those about which there hath been most controversy in our books, under the following heads :

- (A) In what Cases a Fee shall be said to be due.
  - (B) How much shall be said to be due.
  - (C) At what Time it shall be said to be due.
  - (D) In what Court Fees are to be recovered.
  - 3(E) Who shall be entitled to Fees.*g*
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(A) In what Cases a Fee shall be said to be due.

AT common law, no officer, whose office related to the administration of justice, could take any reward for doing his duty, but what he was to receive from the king.

Co. Litt. 368 ; 2 Inst. 176, 208, 209.

And this fundamental maxim of the common law is confirmed by Westm. 1, c. 26, which enacts, “ That no sheriff, nor other (*a*) king’s officer, shall take any reward to do his office, but shall be paid of that which they take of the king ; and that he who so doth shall yield twice as much, and shall be punished at the king’s pleasure.”

(*a*) That this comprehends escheators, coroners, bailiffs, gaolers, the king’s clerk of the market, aulnager, and other inferior ministers and officers of the king, whose offices do any way concern the administration or execution of justice. 2 Inst. 209.—And according to my Lord Coke, by some opinions, it extends to the king’s heralds, for they are the king’s ministers, and were long before this act. 2 Inst. 209.

And so much has this law been thought to conduce to the honour of the king and welfare of the subject, that all prescriptions whatsoever, which have been contrary to it, have been holden void ; as where, by prescription, the clerk of the market claimed certain fees for the view and examination of all weights and measures.

4 Inst. 274 ; Moore, 523 ; 2 Inst. 209 ; 2 Ro. Abr. 226.

But it hath been holden, that the fee of 20*d.*, commonly called the bar-fee, which hath been taken, time out of mind, by the sheriff, of every prisoner who is acquitted ; and also the fee of one penny, which was claimed by the coroner of every visne, when he came before the justices in eyre, are not within the meaning of the statute, because they are not demanded of the sheriff or coroner for doing any thing relating to their offices, but claimed as perquisites of right belonging to them.

21 H. 7, 17 ; 2 Inst. 210, Stamf. P. C.

Also, it is holden by my Lord Coke, that within the words of the statute

(A) In what Cases a Fee shall be said to be due.

34 E. 1, which are *nullum tallagium vel auxilium, per nos vel per hæredes nostros, in regno nostro, ponatur seu levetur, sine voluntate et assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium et aliorum liberorum com. de regno nostro*, no new offices can be erected with new fees, (a) or old offices with new fees; for that is a tallage upon the subject, which cannot be done without common assent, by act of parliament.

2 Inst. 533. [(a) But an ancient fee may attach on a modern act of parliament; such, for instance, as a fee on an oath taken before a justice of the peace, or a judge at chambers; *per* Heath, J., 2 H. Bl. 223.]

(b) But yet it is holden, that an office erected for the public good, though no fee is annexed to it, is a good office; and (c) that the party, for the labour and pains which he takes in executing it, may maintain a (d) *quantum meruit*, if not as a fee, yet as a competent recompense for his trouble.

(b) Moore, 808, Bishop of Sarum's case. (c) Hard. 351 Veale v. Priour, adjudged. (d) Where A was libelled against in the ecclesiastical court for fees, and upon motion a prohibition was granted; for no court has a power to establish fees; the judge of the court may think them reasonable, but that is not binding; but if in a *quantum meruit* a jury think them reasonable, they then become established fees. Salk. 333, Giffard's case. β A ministerial officer whose fees are prescribed by law cannot maintain an action on a promise of extra compensation for extra services, although services beyond those required by law have been performed by the officer. Hatch v. Mann, 15 Wend. 44.g

All fees allowed by acts of parliament become established fees, and the several officers entitled to them may maintain actions of debt for them.

2 Inst. 210. [If an act of parliament recognizes a right to a fee, the *quantum* may be ascertained by usage, though not of ancient date. Fleetwood v. Finch, 2 H. Bl. 226.]

Also, such fees as have been allowed by the courts of justice to their officers, as a recompense for their labour and attendance, are established fees; and the parties (e) cannot be deprived of them without an act of parliament.

21. H. 7, 17; Co. Lit. 368. (e) Pr. Ch. 551.

|| But an act for this purpose has been lately passed, viz., st. 55 G. 3, c. 50, which has abolished all fees and gratuities paid or payable by any prisoner on his entrance, commitment, or discharge to or from prison; all fees or sums of money usually paid or payable to the clerks of assize and clerks of the peace, clerks of the court, or their deputies, by any prisoner charged with a felony, or as accessory thereto, or with any misdemeanor, against whom no bill of indictment is found by the grand jury, or who is acquitted, or discharged by proclamation for want of prosecution; and also the fee or gratuity claimed by the sheriff or under-sheriff for the *liberate* granted to a prisoner on his discharge. To the officers whose fees are thus abolished an allowance is made in lieu of them out of the country rates; and the officer exacting them hereafter is incapacitated from holding his office, and guilty of a misdemeanor.||

Where a fee is due by custom, such custom, like all others, must be reasonable; and therefore when a parson libelled in the spiritual court for a burying fee due to him for every one who died in his parish, though buried in another; the court held this unreasonable, and granted a prohibition.

Hob. 175; Ro. Abr. 557, 559, S. C., adjudged.

So, where a French protestant had his child baptized at the French church in the Savoy, and the vicar of St. Martin's, in which parish it is, together with the clerk, libelled against him for a fee of 2s. 6d. due to him, and 1s. for the clerk; a prohibition was granted; and in this case it was holden by Holt, that no fee could be due for christening but by custom, and that a

(B) How much shall be said to be due.

custom for any person to take a fee for christening a child, when he does not christen him, is not good; and that the vicar, if he had a right to christen, should have libelled for that right.

*Burdeaux v. Dr. Lancaster*, Salk. 332; 12 Mod. 171, S. C.; *Topsall v. Ferrers*, Hob. 175.

The mayor of Yarmouth was held not entitled to a fee of four shillings on the renewal of a publican's license, though regularly paid for a period of sixty-five years; for this length of time could not raise a presumption of immemorial payment, since licenses were not granted till the reign of Edward the 6th; and the mayor, as justice of the peace, was not entitled to any fee.

*Morgan v. Palmer*, 2 Barn. & C. 729.

A tipstaff is entitled to take a fee of six shillings and no more, for conducting a prisoner from the judge's chamber to the King's Bench.

In the matter of *Salisbury*, 5 Barn. & A. 266.

(B) How much shall be said to be due.

HERE we must observe in general, that it is extortion for any officer to take more for executing his office than is allowed by act of parliament, or is the known and settled fee in such case.

10 Co. 102 a; Co. Lit. 368.

But in this place we shall only take notice of the fees of sheriffs for executions, about which there seems to have been the most controversies in our books.

And for this purpose we shall recite (*a*) 28 Eliz. c. 4, by which it is enacted, "That it shall not be lawful to or for any sheriff, under-sheriff, bailiff of franchises or liberties, nor for any of their or either of their officers, ministers, servants, bailiffs, or deputies, nor for any of them, by reason or colour of their or either of their office or offices, to have, receive, or take of any person or persons whatsoever, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods, or chattels of any person or persons whatsoever, more or other consideration or recompense than in this present act is and shall be limited and appointed, which shall be lawful to be had, received, and taken; that is to say, twelve pence of and for every twenty shillings, where the sum exceedeth not one hundred pounds; and sixpence of and for every twenty shillings, being over and above the said sum of 100*l.*, that he or they shall so levy or extend, and deliver in execution, or take the body in execution for, by virtue and force of any such extent or execution whatsoever; upon pain and penalty that all and every sheriff, under-sheriff, bailiff of franchises and liberties, their and every of their ministers, servants, officers, bailiffs, or deputies, which at any time shall directly or indirectly do the contrary, shall lose and forfeit to the party grieved his treble damages; and shall forfeit the sum of 40*l.* of good and lawful English money for every time that he, they, or any of them shall do the contrary; the one moiety thereof to be to our sovereign lady the queen, her heirs and successors; and the other moiety thereof to the party or parties that will sue for the same by any plaint, action, suit, bill, or information, wherein no essoign, wager of law, or protection shall be allowed."

(*a*) In the printed statutes, this act is called 29 Eliz.; but by the parliament roll it is the 28th, and so ought to be recited. Salk. 331; Skin. 363. And this obser-

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vation is right, because the roll has been searched in a modern case, and found to be the 28th. [By 7 Geo. 3, c. 29, it is provided, "That this act shall extend to allow any sheriff, &c. any poundage, for taking the body of any person in execution upon any process at the suit of any sheriff, or other officer or minister of the crown, upon any bail-bond entered into for the appearance of any person prosecuted, either for any duties due or payable to his majesty, or for any penalty inflicted by any act for the preventing of the clandestine running or receiving any customable or prohibited goods; or in any case where the sheriff, &c., would not be entitled to poundage if the proceedings were or had been carried on directly in the name of the crown."]

"Provided always, That this act or any thing therein contained, shall not extend to any fees to be taken or had for any execution within any city or town corporate."

In the construction of this statute the following points have been holden :

[1. That under this statute, the sheriff cannot take any other charge but that for the poundage.

Woodgate v. Knatchbull, 2 T. R. 148.

2. That an action lies against the sheriff for the penalty though the extortion were by the bailiff.

Woodgate v. Knatchbull, 2 T. R. 148.

3. That if the sheriff levy under a *fi. fa.*, he is entitled to poundage, though the parties should compromise before he sells any of the goods.

Alchin v. Wells, 5 T. R. 470.]

4. That though the words of the statute are, that it shall not be lawful for the sheriff to take any more, or greater fee, than by the act is limited, &c., that herein by implication at least, if not by express words, a right is given to the sheriff to demand those fees mentioned in the statute; and, consequently, that he may, as in all cases where the statute creates a debt or duty, (a) maintain an action of debt for them; [but the action must be in the name of the sheriff, and not of the bailiff.]

Moore, 853, pl. 1166; Probev v. Lumley, adjudged; Latch. 19; Poph. 175; Palm. 400; Salk. 331, S. P., admitted; and vide Cro. Eliz. 335; 2 T. R. 155; 2 Str. 1262. || And he may attain this action, notwithstanding the st. 43 G. 3, c. 46, § 5, empowers the levying of the poundage under the execution; for this was merely a boon to the plaintiff, and does not vary the rights of the sheriff. Rawstone v. Wilkinson, 4 M. & S. 256. || (a) But he cannot take a bond for his fees, though he takes it for no more than the statute allows, and bring debt on that. Winch. 51, 52; Cro. Ja. 103; Cro. Car. 286.

5. It hath been adjudged, that the sheriff shall have a shilling *per* pound for the first hundred, and sixpence *per* pound for every other pound exceeding a hundred; and not sixpence for every pound where the whole debt happens to exceed a hundred pound: for by this construction the sheriff would have less where the debt was 199*l.* than if it were but 100*l.*, and the intention of the statute was to allow sheriffs such reasonable fees as would encourage them to discharge this branch of their duty so much favoured by the law, with vigour and success, who before were backward and intimidated, by reason of the dangers they run from escapes, &c., from engaging herein; and therefore it has been holden the most reasonable construction to allow them their fees in proportion to such danger.

Poph. 173; Welden v. Vesey, Hil. 1 Car. 1; Latch. 17, 18, 52; Palm. 399, 400; Bendl. 165; Noy, 75, S. C. adjudged by three judges against Cro. J.; Cro. Car. 286-7; Lister and Bromley, S. P. adjudged; Trin. 8 Car. 1; 1 Jones, 307, S. C., adjudged and affirmed on a writ of error; Salk. 331, S. P., admitted to be law; and vide Cro. Eliz. 263-4.

6. It hath been resolved, on the proviso of the said statute, that it shall

## (B) How much shall be said to be due.

not extend to any fees to be taken for any execution within any city or town corporate; that this must be intended of executions on judgments given in those courts; and that therefore where a sheriff executes a judgment given in Westminster Hall in a city or town corporate, he is as much entitled to his fees, pursuant to this statute, as if the execution had been done in any part of the county at large; for herein the sheriff runs as great a risk, and his trouble is as great. But, where both the judgment and execution are within a limited jurisdiction, it cannot be presumed to be attended with equal difficulty; and therefore the proviso in the statute excludes them.

Latch. 17, 18; Poph. 173; Palm. 399, 400; Dalt. Sheriff, 527, *cont.* Cro. Eliz. 263, 264, and vide *Brookwell v. Lock*, 5 Mod. 97, where an action of debt was brought by the bailiff of the palace court of the Bishop of Rochester for fees, upon execution of a judgment in that court, pursuant to this statute; and after verdict for the plaintiff, the judgment was staid, although it was objected, that the proviso in the statute could not extend to it, being neither a city nor a town corporate where the execution was made; nor was it within the reason thereof, because the bishop's jurisdiction is as large as his diocese; and the reason of the proviso, that no execution fees should be taken in cities and towns corporate, is from the narrowness of those jurisdictions, which renders executions in them more easy and less dangerous. Salk. 331, S. C., but no judgment.

7. It hath been resolved, that the bailiff of (a) a liberty, who executes a judgment given in Westminster Hall, is entitled to the fees, within the words and meaning of the statute; and not the sheriff of the county, who directs his precept to him.

Latch. 19, 52; Poph. 175; Salk. 331; Dalt. Sheriff, 526, S. P. And there said, that the constant practice was so; and Noy, 27; Cooper and Iles, S. P., adjudged, for he shall answer for the escape, &c., and therefore ought to have the fees. (b) So, if the execution of a judgment in Westminster be in a city, which is a county of itself, the sheriff there shall have his full fees, for he is the proper officer to the courts above. Latch. 19; Palm. 401; Dalt. 527; Cro. Eliz. 263, 264.

8. It seems agreed, that if a sheriff makes an *extent*, and before the *liberate* a new sheriff is chosen, the new sheriff shall have the fees appointed by the statute.

Winch. 50, 51, *per* Hob. C. J.; Dalt. Sheriff, 526. Vide stat. 3 Geo. 1, c. 15, § 9, which directs an apportionment of the fees in such case between the precedent and subsequent sheriff.

9. It hath been resolved, that the statute does not extend to real executions, such as *habere facias seisinam*, or *possessionem*, (b) but only to executions in personal actions. Also it is said, that the statute does not extend to executions upon statutes merchant, recognisances, &c., and that the act is to be understood of cases where the judgment *redditur in invitum*, and not by the voluntary confession of the party.\*

Salk. 331, Peacock v. Harris. (b) But he may take fees upon the execution of these writs by st. 3 G. 1, c. 15, § 16, which limits the sum, and directs that no sheriff, under-sheriff, deputy-sheriff, or their bailiffs, or the bailiff of any franchise or liberty, by reason of any writ of *habere facias possessionem aut seisinam*, shall take above 1s. *per* pound of the yearly value of any manor, &c., where the whole exceeds not 100l. *per annum*, and 6d. only for every 20s. above such yearly value. And by 8 Geo. 1, c. 25, § 5, no more is to be taken on an *extent* and *liberate*. \*Certainly the sheriff is entitled to his fees on a judgment by confession.

10. That for executing a *capias utlagatum*, or for a warrant to execute it, or for a return of it, no fee is due to the sheriff, because this is at the suit of the king.

Vildshire's case, Hetl. 52; Lit. Rep. 65, S. C.; 2 Brownl. 283, S. P. || In the case of *Graham v. Gill*, 2 M. & S. 294, it was contended that in an outlawry in a civil suit the sheriff was entitled to his poundage; but the point was not determined, the sheriff having no title to poundage, because he had not levied the money.||

## (B) How much shall be said to be due

11. It seems to have been resolved, that upon a *capias ad satisfaciendum*, the sheriff shall have his fees for the (a) whole debt. Also, (b) if one in execution dies, and a *fieri facias* issues against his goods, the sheriff shall have his fees upon executing the *fieri facias*, for his trouble was as great as at first.

Salk. 331. [(a) By st. 3 Geo. 1, c. 15, § 17, the sheriff shall not take poundage for executing any *ca. sa.*, where part of the debt hath been paid, for any greater sum than what remains due to the plaintiff, who is to mark the same on the back of the writ, and the sheriff, &c. is guilty of extortion, and shall forfeit to the party grieved treble damages, and double the sum so extorted, and also 200*l.*] But that upon executing an *elegit* where perhaps the land is not worth 40*s.*, it is unreasonable that the sheriff should have 6*d.* for every pound of the debt. Cro. Ja. 103, *per Curiam*, and vide Salk. 331, where, by Treby, Ch. J. in such case he shall have fees according to the sum levied, and not according to the debt recovered.——But this is denied by Powell, because the party might detain the land till he was satisfied the entire debt; and the plaintiff is, by having made his election, barred of all other executions. (b) Vide Skin. 363, pl. 7.

[By st. 3 Geo. 1, c. 15, § 3, Sheriffs levying debts, &c. (except post fines) due to the crown, by process of the pipe, or *levari facias*, shall have 12*d.* *per* pound for any sum not exceeding 100*l.* levied, and 6*d.* for every 20*s.* above that sum; and on process by *fi. fa.* and *extent*, shall have 1*s.* 6*d.* *per* pound for any sum not exceeding 100*l.* levied; and 1*s.* *per* pound above that sum; provided they answer the same on their accounts by a day to be fixed by warrant of the barons.

By § 13, No sheriff or other person employed in levying, &c. debts to the crown, shall take any fee except 4*d.* only for an acquittance; and if a sheriff, &c. demand or take any money for executing, or forbearing to execute such process, he forfeits treble damages and costs to the party aggrieved, and double the sum so extorted; which damages and penalties shall be given by the barons of the Exchequer in such summary way as they shall deem proper; provided the conviction be within two years after the offence committed. Nevertheless, by § 14, the sheriff may take such poundage and allowance as are given by this act, and such allowance as may be made by the Treasury or Exchequer for any extraordinary service to the crown.

The sheriff may retain poundage, without waiting for an allowance of it in his account, and this upon an extent in aid. And his right to poundage may be determined upon motion.

R. v. Burrell, Bunb. 305; R. v. Thomas Jetherell, Parker, 177.

|| But, where the sheriff had retained his poundage out of money levied by him upon an attachment for non-payment of money, the court directed him to refund it, there being no practice to warrant it; and they referred him to his action, if he supposed himself entitled to it, under the statute of 23 H. 6, c. 9.

R. v. Palmer, 2 East, 411.||

The sheriff hath been allowed poundage out of a fine (imposed after conviction upon an indictment of battery in K. B.) levied upon a *fi. fi.*; for the barons of the Exchequer always make such allowance after moneys paid there by the clerk of the crown.

R. v. Wade, Skin. 12; Sir T. Jon. 185.]

||By st. 57 G. 3, c. 91, the justices of the peace, those of Kent and Lancaster, at their annual general sessions of the peace, and those of every other county, riding, division, city, town, liberty, or precinct in England and Wales at their general quarter sessions, are empowered to settle a table

(C) At what Time it shall be said to be due.

of fees to be taken by the clerk of the peace in their respective counties, &c. to be approved by the justices in the next sessions, and then laid before the judges of assize or the justices of the great sessions in Wales, who may ratify and confirm the table so made, or make such alterations therein as shall appear to be reasonable; and any clerk of the peace demanding or taking any other or greater fee or allowance than shall be contained in such table shall forfeit five pounds.||

(C) At what Time it shall be said to be due.

HERE also we must observe, that it is extortion for an officer to take his fee before it is due; and therefore (a) where an under-sheriff refused to execute a *capias ad satisfaciendum* till he had his fee, the court held that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for (b) extortion.

Co. Lit. 368; 16 Co. 102 a. (a) Salk. 330. (b) So, where on a motion that an under-sheriff might attend for refusing to execute a *fieri facias* till his shilling and pence were paid, the court would not grant the rule, but said it was extortion, for which he might be indicted. Salk. 331.

If a *habeas corpus ad subjiciendum* be directed to a gaoler, he must bring up the prisoner although his fees were not paid him; and he cannot excuse himself of the contempt of the court, by alleging, that the prisoner did not tender him his fees.

Keb. 272.

Also, it is no excuse for not obeying a writ of *habeas corpus ad faciendum et recipiendum*, that the prisoner did not tender him his fees.

March, 89; Keb. 280; 2 Johns. 178; but Keb. 566, *cont.*

But, if the gaoler brings up the prisoner by virtue of such *habeas corpus*, the court will not turn him over till the gaoler be paid all his fees; nor, according to some opinions, till he be paid all that is due to him for the prisoner's diet; for that a gaoler is not compellable to find his prisoner sustenance.

But for this vide Ro. Rep. 338; Co. Lit. 295; 9 Co. 87; Plow. 68 a; 2 Ro. Abr. 32; 2 Jones, 178.

If a person pleads his pardon, the judges may insist on the usual fee of gloves to themselves and officers, before they allow it.

Fitz. Coron. 294; 4 E. 4, 10 b; *Pulton de pace*, 88 a; Kelinge, 25; 2 Jon. 56; Sid. 452.

If an erroneous writ be delivered to the sheriff, and he executes it, he shall have his fees, though the writ be erroneous.

Salk. 332; Earle v. Plummer, 1 Salk. 332; Alchin v. Wills, 5 T. R. 470; Rawstone v. Wilkinson, 4 M. & S. 256.

It seems to be laid down in the old books as a distinction, that upon an extent of land upon a statute, the sheriff is to have his fees, so much *per* pound, according to the statute immediately; but that upon an *elegit* he is not to have them (c) till the *liberate*.

Poph. 176; Winch. 51, S. P. and there said, that the sheriff cannot take his salary, appointed by the statute, till a complete execution, viz. till the *liberate*; for the words of the statute are in the negative, and do not establish the fees, but only tolerate them. (c) And therefore if the conuzee sue an extent, and then refuse to sue the *liberate*, to the intent to defraud the sheriff of his fees, the sheriff may have his remedy by action on the case. Winch. 51, *per* Hobart.

But where the sheriff, having executed an *elegit*, brought an action of

## (D) In what Court Fees are to be recovered

debt for his fees; and it was objected, that this was not within the statute, the execution not being complete, for the plaintiff could not enter, but must bring his ejectment; it was holden by Holt, that there was the same reason for fees for executing an *elegit* as an extent; for upon an *elegit* the sheriff returns, that he has taken an inquisition, extended the lands, and delivered them to the plaintiff; and that there is a *liberate* in the body of the writ of *elegit*, on the return of which the plaintiff may enter. For by the return he becomes tenant by *elegit*, and may maintain an ejectment, and assign his interest upon the land; but the defendant's continuing in possession after the return of the writ turns the plaintiff's estate to a right, and therefore he must enter to assign. And his being put to an ejectment is no reason, for in case of an extent upon a statute, where the *liberate* is distinct, he cannot enter by force. It is true he may without force, and so he may here. And Powell said, that extent generally is the word of the statute 28 Eliz. c. 4, and that an extent upon an *elegit* was an extent within the statute, as well as an extent upon a statute.

Tyson v. Paske, 1 Salk. 333; 2 Ld. Raym. 1212.

§ A constable cannot recover his fees upon an execution, where he has levied upon property and returned it as in his hands for want of buyers. To entitle him to his fees, he must levy the money, except where he is prevented by the plaintiff or the act of law. (a) When, however, after a levy, the case is settled by the parties, the sheriff is entitled to his fees. (b)

(a) Pixley v. Butts, 2 Cowen, 241. (b) Hildreth v. Ellice, 1 Caines, R. 192. g

## (D) In what Court Fees are to be recovered.

A SOLICITOR in Chancery may exhibit his bill for his fees for business done in that court; and so he may where the business is done in another court, if it relates to another demand the plaintiff makes in Chancery.

Lord Ranelagh v. Thornhill, Vern. 203; 2 Chan. Ca. 153, S. C. || It would seem, that a clerk in court may sue a solicitor by bill in equity, for an account of their dealings and transactions in that relation. Such has certainly been understood to be the practice; and where, to a bill by a clerk in court against a solicitor, for payment of a certain sum, stated as the amount of the plaintiff's bill for fees and disbursements, there was a demurrer to the relief for want of equity, Lord Eldon thought himself fully authorized to overrule the demurrer. Barker v. Dacie, 6 Ves. 681. But, where the bill has been exhibited by a stranger, as by the executrix of a solicitor for business done by the testator, the demurrer has been allowed. Parry v. Owen, Ambl. 109; 3 Atk. 40, S. C. ||

But it hath been holden, that chancellors, registrars, and proctors, who are officers of temporal profit, and whose fees do not relate to the jurisdiction of the spiritual court, cannot sue for them in the spiritual court.

Vide 3 Leon. 268; 2 Ro. Rep. 59; Mod. 167; 2 Keb. 615; 3 Keb. 303, 441, 516; 4 Mod. 254; 5 Mod. 242; 10 Mod. 261, 440; 12 Mod. 583; Lord Raym. 703; Com. Rep. 18, pl. 11. So, parish clerks, 2 Str. 1108, and apparitors, Dougl. 629. § Each party is liable to the clerk of the Supreme Court for fees due for services performed for such party; it is immaterial to the clerk which party recovers judgment. Caldwell v. Jackson, 7 Cranch, 276. g

As, where the registrar in the ecclesiastical court libelled there for 4s. 6d. for his fees, and proceeded to excommunication; and the defendant suggested, that the office of registrar was a temporal office, and a freehold, and moved for a prohibition, which was granted; for the court hath no power to compel the party to pay fees to their officers, but they must bring their *quantum meruit*; or if the office be a freehold, they may bring an assize,



## Felony.

for the denial of just fees is a disseisin; although it was objected, that this case differed from that of a proctor, because the registrar is a mere officer of the court, and the court may appoint a reasonable fee to the officers that attend them.

Salk. 333, *Bailard v. Gerrard*.

So, a prohibition was granted to stay a suit in the archdeacon of Litchfield's court, against churchwardens for a fee for swearing them and taking their presentments, because no fees could be due but by custom, or for work done, in which case a *quantum meruit* lay.

Salk. 330, *Goslin v. Ellison*.

Again, the dean and chapter of the cathedral church of Exeter, having the freehold and inheritance of the said church, had by prescription 10*l.* for every corpse that was buried in the said church; and the defendant's testator being buried there, without their license, the defendant refused to pay the 10*l.* for which they sued him in the ecclesiastical court. On showing cause why a prohibition should not go, it was urged, that none can prescribe to have a burying-place in a cathedral church, for the parishioners have nothing to do with it, nor pay any tithes to it; but in the parish church to which they pay tithes and other duties, there such a prescription may be good, and in the church-yard they have a right to be buried without any prescription. But the court held, admitting that no person could prescribe to bury in a cathedral church, and admitting that this fee, like that of 20*l.*, which is usually paid for burying in the cathedral church of Westminster, is reasonable, yet it is not of spiritual cognisance, but is in nature of a license, on which a *quantum meruit* may be brought, and the constant usage to pay so much given in evidence; and therefore the prohibition was granted.

Hil. 5 Ann; *Dean and Chapter of Exeter v. Drue*; Salk. 334, S. C.

℔ (E) Who shall be entitled to Fees.

Where three members of the bar entered their appearance for the defendant, to suits instituted against him, and all were equally called upon, and acted as the attorneys of the defendant, no warrant of attorney having been given to either by the defendant; it was held that the attorney's fee, in the bill of costs, was to be divided among all who had acted in the case, and who had appeared to the suits.

Hurst v. Durnell, 1 Wash. C. C. R. 438.

## FELONY.

WHOEVER becomes infamous by the commission of a crime which subjects him to a capital punishment, is said to be guilty of felony; which, *ex vi termini*, says my Lord Coke, signifies *quodlibet crimen felleo animo perpetratum*, and can be expressed by no periphrasis or word equivalent, without the word *felonice*.

Spelm. Gloss. *verbo feloniam*; Co. Lit. 391. [Sir Wm. Blackstone defines felony to

(A) Of what Nature the Things taken must be, &c.

be an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt. 4 Bl. Comm. 95. He therefore derives the word felony from the Saxon *feo*, or *feoh*, fee, or feud; and the German *lon*, price, as being a crime punishable with the loss of the feud or benefice. Ibid. But, as in petit larceny, the lands are not liable to escheat; and petit larceny hath always been ranked among felonies; a later writer seems inclined to derive it from *pælen*, in the sense of offending. 2 Wooddes, 510. It is to be observed, that the Saxon *feo*, or *feoh*, in its primitive sense, signified money or goods; that is, in a translated sense, an inheritance or feud. Lye's Sax. Dict. voc. *Feo*. Spelm. Gloss. *ubi supra*.] β Pothier, in his treatise *Des Fiefs*, partie 1, chapitre 3, section 2, says that felony is an atrocious wrong committed by a vassal towards his lord, by which the former forfeited his fief to the latter. Merl. Répert. h. t.; Dalloz, Dict. h. t. §

Felony is included in (a) high treason, murder, robbery, burglary, rape, sodomy, &c.; but for these we shall refer to their proper heads, and in this place chiefly consider it as a violation of a man's property, known by the name of larceny.

(a) And consequently a pardon of felony discharges an indictment of high treason, if it wants the word *proditorie*. H. P. C. 11; 3 Inst. 151; 1 Hawk. P. C. c. 25, § 1.

For the better understanding whereof we shall consider,

- (A) Of what Nature the Things taken must be, to constitute the Offence Felony
- (B) How far the Goods ought to belong to another.
- (C) What shall be said to be a felonious and fraudulent Taking.
- (D) What shall be said to be a carrying away.
- (E) By whom the Offence may be committed.
- (F) Of what Value the Goods must be: and herein of the Difference between Grand and Petit Larceny.
- (G) Where the Offender is or is not excluded his Clergy.
- (H) Where the Offender is to be transported.
- β (I) Legal consequences of felony. §

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(A) Of what Nature the Things taken must be, to constitute the Offence Felony.

HERE it may be proper to take notice, that in the times of the military tenures every tenant was obliged to attend in the camp; and there being no provision made out of the public stock for them, as there is now-a-days for our mercenary soldiery, it was necessary for every freeman to carry with him his own provision; which induced the necessity of a very severe and rigid justice upon all persons who should violate any man's property; otherwise camps would have been scenes of intolerable violence, and every man would have perished by his neighbour's sword, and not by his enemies. Hence was learned the institution of punishing theft by death, and thence derived into the civil state, which consisting of the same orders and conditions of men, it was necessary that the same measures of justice should be used both at home and in the camp; for they could not understand that a freeman should be punished otherwise in the camp than in the civil state, as they thought justice was the same, and could not alter with the distinction of countries and places; and therefore it is that in this punishment our law differs from the (b) Roman and Mosaic laws, which only oblige those sort of offenders to the restitution of four-fold; and custom hath approved the method; for should we admit a restitution from such profligate offenders, we should have no end of rapine and violence.

(b) S. P. C. 25; see Exod. 22.

(A) Of what Nature the Things taken must be, &c.

Hence we have the reason of the distinction between real and personal property, and why our law does not punish the stealing (*a*) of corn or grass growing, or apples on a tree, or (*b*) lead on a church or house with death; because these never came under the camp discipline; and therefore it was not necessary to guard this sort of property with such sanguinary laws, where the redress might be by a civil action.

(*a*) 12 Ass. 32; Bro. Coron. 77; Crompt. 37; 18 H. 8, 2, S. P. C. 25 b; Mod. 89; Allen, 83; 2 Keb. 875; Vent. 187. (*b*) But now by the 4 Geo. 2, c. 32, every person who shall steal or rip, cut or break, with intent to steal, any lead, iron bar, iron gate, iron palisade, or iron rail whatsoever, being fixed to any dwelling-house, out-house, coach-house, stable, or other building used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever; or fixed in any garden, orchard, court-yard, fence, or outlet belonging to any dwelling-house, or other building, shall be deemed and construed to be guilty of felony; and the court, before whom such persons shall be tried, shall and hereby have power to transport such felons for seven years; as also such persons who shall be aiding, abetting, or assisting in stealing, &c., or who shall buy or receive any such lead, &c., knowing the same to be stolen. [By 21 G. 3, c. 68, "Whoever shall rip, cut, break, or remove, with intent to steal any copper, brass, bell-metal, utensil, or fixture, being fixed to any dwelling-house, out-house, coach-house, stable, or other building used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court-yard, fence, or outlet belonging to any dwelling-house or other building, or any iron rails or fencing set up, or fixed in any square, court, or other place (such person having no title or claim of title thereto); or whoever shall be aiding, abetting, or assisting therein, or shall knowingly buy or receive the same, although the principal felon hath not been convicted of stealing the same, shall be guilty of felony, &c." By 25 G. 2, c. 10, stealing black lead in the mine is felony.

But, if they are severed from the freehold, whether by the owner, or even by the thief himself, if he sever them at one time, and then come again at another time and take them, it is felony.

Vent. 187; 1 Hawk. P. C. c. 33, § 21.

If a man take away a box of charters, this is not felony, because they are the muniments of the freehold, and relate to the estate at home, and not to the provisions that were used in supplying the camp abroad.

3 Inst. 109; H. P. C. 66. ¶ So, of a commission to settle boundaries. *R. v. Westbert*, 2 Str 1133.]]

But it is said, in (*c*) *Hale*, to be felony to take away an obligation for money. And the reason hereof may be, because securities might be taken to answer money at the camp from a neighbouring freeholder; and therefore there was the same reason they should be within this provision, as that other chattels should be protected by the obligation, being equally valuable.

(*c*) H. P. C. 67.

Lord *Hale's* dictum that the stealing an obligation for money, is felony at common law, seems at least doubtful; and accordingly the 2 G. 2, c. 25, § 2, and 52 G. 3, c. 143, § 1, had expressly made it felony to steal Exchequer orders or tallies, South Sea and East India bonds, and other instruments. And now by Sir Robert Peel's late act (7 & 8 G. 4, c. 29, § 5), if any person steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings bank, or shall steal any debenture, deed, bond, bill, note, warrant, or other security whatsoever, for money or for payment of money whether of this kingdom or of

(A) Of what Nature the Things taken must be, &c.

any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony, and punishable in like manner as if he had stolen any chattel of like value with such security or with the money due thereon.

And with respect to stealing charters and muiments of title, the same act, sect. 22, renders the stealing or destroying, or concealing of wills, &c., a misdemeanor, punishable by transportation for seven years, or such other punishment by fine or imprisonment as the court shall award; and it is not necessary to allege that the will is the property of any person, or of any value.

And by sect. 23, the same provision is made as to the stealing of title deeds and writings, as to real estate.

And by sect. 21, the same provision is made as to the stealing, obliterating, or destroying any records or proceedings of any court.

And with respect to animals *feræ naturæ*, the same act, sect. 31, enacts, that if any person shall steal any dog, or shall steal any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law, every offender shall on conviction of a justice, forfeit above the value of the animal any sum (not exceeding 20*l.*), which the justice shall think fit, and for the second offence shall be imprisoned for not exceeding twelve months, and kept to hard labour; and if the second conviction is before two justices, they may order the offender, if a male, to be once or twice publicly or privately whipped.

And with respect to things fixed to the freehold, it is by the same act, sect. 44, enacted, that if any person shall steal or rip, cut or break with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, any such offender shall be guilty of felony, and being convicted, shall be punished as for simple larceny; and in case such thing is fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person.

And by the same act, sect. 37, stealing, or severing with intent to steal, the ore of any metal, or *lapis calaminaris*, manganese or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, is made felony punishable as simple larceny.

And by the same act, sect. 38, stealing, cutting, or rooting up or destroying, or damaging with intent to steal, trees, saplings, shrubs or underwood, above 1*l.* value, growing in any park, pleasure-ground or orchard, or in any ground adjoining or belonging to any dwelling-house, is felony, punishable as simple larceny; and the same acts as to trees, &c. growing in any other situation, of the value of 5*l.*, is felony, punishable in like manner.

And, by sect. 39, any person stealing, cutting, breaking, rooting up, destroying or damaging with intent to steal, any tree, shrub, &c., of any value above one shilling, shall forfeit above the value such sum, not exceeding 5*l.*, as to a justice shall seem meet, and for the second offence shall be committed to jail for any term not exceeding twelve months, and for the third offence shall be deemed guilty of felony, and punished as for simple larceny.

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And, see sect. 40, 42, 43, as to stealing, cutting or breaking down any wooden posts, pales, fences, &c., and roots, fruits, and vegetable productions. ||

β Pulling wool from the bodies of live sheep and lambs, *animo furandi*, is larceny, and it is the same offence feloniously to take milk from a cow.

Rex v. Martin, 1 Leech, C. C. 171; S. C. East, P. C. 618.

If a parcel be accidentally left in a hackney-coach, and the coachman, instead of restoring it to the owner, detain it, open it, destroy part of its contents, and borrow money on the rest, he is guilty of felony.

Rex v. Wynne, 1 Leech, C. C. 413; S. C. 2 East, P. C. 664; S. P. Rex v. Sears, 1 Leech, C. C. 415, n.; see Anon. 2 Russ. C. & M. 102; Rex v. James, 2 Russ. C. & M. 102.γ

But, *per* Hawkins, the things taken ought to have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing, which cannot be stolen, as paper or parchment, on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt or other *chose* in action. And the reason, he says, wherefore there can be no felony in taking away any such things, seems to be, because generally speaking they, being of no manner of use to any but the owner, are not supposed to be so much in danger of being stolen, and therefore, need not be provided for in so strict a manner as those things which are of a known price, and everybody's money. And for the like reason, it is no felony to take away a villein or an infant in ward.

1 Hawk. P. C. c. 33, § 22, for which are cited H. P. C. 66, 67; 3 Inst. 109; Bro. Coron. 155, S. P. C. 25 b; Coron. 27. β If the subject of the larceny be of any, although of no assignable value in the coin of the realm, it is not less the subject of larceny. Reg. v. Morris, 9 C. & P. 351.γ

|| By 8 H. 6, c. 12, § 3, it is ordered, that, "if any record or parcel of the same, writ, return, panel, process, or warrant of attorney, in the king's courts of Chancery, Exchequer, of the one Bench or the other, or in his Treasury, be willingly stolen, taken away, withdrawn, or avoided by any clerk, or by other person, by means whereof any judgment shall be reversed, that such stealer, taker-away, withdrawer, and avoider, their procurators, counsellors, and abettors, thereof indicted, and by process thereupon made, thereof duly convict by their own confession, or by inquest to be taken of lawful men, whereof the one half shall be of any court of the same courts, and the other half of other, shall be adjudged for felons, and incur the pain of felony; and that the judges of the said court, of the one bench or the other, shall have power to hear and determine such defaults before them, and thereof to made punishment as before is said."

By the (a) 2 Geo. 2, c. 25, it is enacted, "That if any person or persons shall steal, or take by robbery, any exchequer orders or tallies, or other orders, entitling any other person or persons to any annuity or share in any parliamentary fund, or any exchequer bills, bank notes, South Sea bonds, East India bonds, dividend warrants of the bank, South Sea Company, East India Company, or any other company, society, or corporation, bills of exchange, navy bills or debentures, goldsmiths' notes for payment of money, or other bonds or warrants, bills or promissory notes for the payment of any money, being the property of any other person or persons, or of any corporation, notwithstanding any of the said particulars are termed in law a *chose in action*, it shall be deemed and construed to be felony, of the same nature and in the same degree, and with or without the benefit of the clergy, in the same

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manner as it would have been, if the offender had stolen or taken by robbery any other goods of like value with the money due on such orders, tallies, bills, bonds, warrants, debentures, or notes, or secured thereby, and remaining unsatisfied; and such offender shall suffer such punishment, as he or she should or might have done, if he or she had stolen other goods of the like value with the money due on such orders, tallies, bonds, bills, warrants, debentures, or notes, respectively, or secured thereby, and remaining unsatisfied."

(a) Made perpetual by G. 2, c. 18; by 7 G. 2, c. 22. If any person or persons shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, &c., any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or other security for payment of money; or any warrant or order for payment of money, or delivery of goods, with intention to defraud any person whatsoever; or utter, or publish as true, any false, altered, forged or counterfeited acceptance of any bill of exchange, &c., with intention to defraud, knowing the same to be false, &c., he or they shall be guilty of felony without benefit of clergy.¶

[And by 5 Geo. 3, c. 25, § 17, and 7 Geo. 3, c. 50, § 2, "Whoever shall rob any mail in which letters are sent or conveyed by the post, of any letter, packet, or bag of letters, or shall steal and take from any such mail, or from any bag of letters sent or conveyed by the post, or from or out of any post-office, or house or place for the receipt or delivery of letters or packets sent, or to be sent by the post, any letter or packet, although such robbery, stealing, or taking shall not appear or be proved to be a taking from the person, or upon the king's highway, or to be a robbery committed in any dwelling-house, or any coach-house, stable, barn, or any out-house belonging to a dwelling-house; and although it should not appear that any persons were put in fear by such robbery, stealing, or taking, yet such offenders shall be deemed guilty of felony, and suffer death without the benefit of clergy."]

It is also from the strict discipline that was observed in the camp, that the distinction is raised concerning beasts that are *feræ naturæ*; for those that are for the provision of man, when reclaimed, are within the protection of the law, and it is felony to steal them, because they answered the use of the camp for their necessary food and sustentation; but dogs, cats, bears, foxes, monkeys, ferrets, and the like, that are not used for provision, may be stolen without any danger of death, for they are not within the inconvenience for which the law was provided.

11 P. C. 66; 7 Co. 18; 3 H. 8, 3 b; Crom. 36; Dalt. c. 103; 3 Inst. 109; Hawk. P. C. c. 33, § 23. ¶ A dog at common law is not the subject of larceny. Findlay v. Bear, 8 S. & R. 571. Bees unconfined, in their natural state, are not property of which larceny can be committed. Wallis v. Mease, 3 Binn. 546. This agrees with the Roman law, Inst. 2, 1, 14; Dig. 41, 1, 5, 2. But in New York it has been held that bees in a tree, unreclaimed, belong to the owner of the soil. 15 Wend. 550. See 1 Cowen, 243.¶

But to steal hawks reclaimed is felony, (b) because they were used for the entertainment of noble and generous persons, and were carried into the camp for diversion there; and therefore were construed within the same provision.

3 Inst. 109. (b) And this is also made felony by 37 E. 3, c. 19.

¶ A slave may be the subject of larceny; (c) even if the slave be a runaway, if the criminal knew to whom he belonged. (d)

(c) State v. Hall, 1 Tayl. 126. (d) State v. Davis, 2 Car. Law Rep. 291.¶

Wherever it is felony to steal beasts, it is so in relation to the (c) young

(B) How far the Goods ought to belong to another.

of such beasts, because they by right of accession follow the condition of the dams.

3 Inst. 109; H. P. C. 68. (e) But it is not felony to steal eggs of swans and hawks, but a particular punishment is prescribed by the statute 11 H. 7, c. 17. H. P. C. 68.

β A misdemeanor cannot be considered as made a felony, in the construction of a penal statute but by express or by necessary implication; as, for example, when a statute provides for the punishment of accessaries after the fact, as distinct offenders, the perpetrators of the fact must be considered as felons, because to felony only, are there accessaries after the fact.

Commonwealth v. Barlow, 4 Mass. 439; Commonwealth v. Macomber, 3 Mass. 254; Commonwealth v. Newell, 7 Mass. 245; Commonwealth v. Carrol, 8 Mass. 490.

Where property was stolen in France and found in the prisoner's custody in England, it was held the court in the latter country had no jurisdiction.

Reg. v. Madge, 9 C. & P. 29; See R. v. Prowse; Ry. & M. 29.

Larceny committed in one of the states of the Union, is not punishable in another, although the thing stolen be brought into the latter state.

State v. Brown, 1 Hayw. 100; 5 Binn. 617; 2 Johns. 477; 2 Caines, Cas. 213. See vide Comm. v. Cullins, 1 Mass. 116; Comm. v. Andrews, 2 Mass. 14.

But if goods be stolen in one county and taken into another by the thief, he may be indicted in either, the offence being complete in both.

Commonwealth v. Cousins, 2 Leigh, 708. .

In New York, a breach of prison by a person in confinement in jail, on a charge of felony, is itself a felony above the degree of petit larceny, and punishable by imprisonment in the state prison for a period not exceeding fourteen years.

The People v. Duell, 3 Johns. 449.7

(B) How far the Goods ought to belong to another.

THE taking of goods, whereof no one had a property at the time, cannot be felony; and therefore he who takes away treasure trove, or a wreck,\* waif, or stray, before they have been seized by the persons who have a right thereto, shall only be punished by fine, &c.

3 Inst. 109; H. P. C. 67; Hawk. P. C. c. 33, § 24. \* Plundering shipwrecked goods, or beating, &c., with intent to kill, or otherwise obstructing the escape of any person from such ship, or putting out false lights, with intent to bring any ship into danger, felony without benefit of clergy. 26 G. 2, c. 19.

If one takes fish in a river, or other great water, wherein they are at their natural liberty, he is not guilty of felony; but he who takes them out of a trunk or pond is guilty of felony, because being thus secured, the party hath the full dominion of them.

Owen, 20; 3 Inst. 109; H. P. C. 97.

And for this reason there can be no doubt but that the taking of domestic beasts, as horses, mares, colts, &c., or of any creatures whatsoever, which are *domitæ naturæ*, and fit for food, as ducks, hens, geese, turkeys, peacocks, or their eggs, or young ones, is felony.

H. P. C. 68; 3 Inst. 109; Hawk. P. C. 94.

But a man cannot commit a felony by taking (a) deer, hare, or conies in a forest, chase, or warren, or old pigeons being out of the house.

Hawk. P. C. c. 33, § 26. (a) Vide 3 W. & M. c. 10, an act for the more effectual discovery and punishment of deer stealers; and 5 Geo. 1, c. 15, an act by which such offenders are liable to transportation; and 9 Geo. 1, c. 22, commonly called the Black

(B) How far the Goods ought to belong to another.

Act, made perpetual by 31 Geo. 2, c. 42, § 2, by which persons going armed, having their faces blacked, or disguised, and hunting deer, robbing any warren, fish-pond, &c., are guilty of felony, and excluded the benefit of their clergy.

But a person, who takes any other creatures, though *feræ naturæ*, if they be fit for food, and reduced to tameness, and known by him to be so, is guilty of felony; also, by the better opinion, it is felony to steal wild pigeons in a dove-house shut up, or hares or deer in a house, or even in a park, enclosed in such a manner that the owner may take them whenever he pleases, without the least danger of their escaping; in which case they are as much in his power as fish in a pond, or young pigeons or hawks in a nest, &c., the taking of which seems agreed to be felony.

3 Inst. 109; 7 Co. 17; H. P. C. 86; Hawk. P. C. c. 33, § 26.

Also, the taking away of swans marked or pinioned, or those which are unmarked, if kept in a pond or private river, is felony.

Hal. P. C. 68; Hawk. P. C. c. 33, § 27.

Also, it is said, that there may be felony in taking goods, the owner whereof is unknown; in which case the king shall have the goods, and the offender shall be indicted for taking *bona cujusdam hominis ignoti*. And it seems that, in some cases, the law will rather feign a property, where in strictness there is none, than suffer an offender to escape; and therefore it is said, that he who takes away the goods of a chapel, or abbey, in time of vacation, may be indicted in the first case for stealing *bona capellæ*, being in the custody of such and such; and in the second, for stealing *bona domûs et ecclesiæ*, &c., and *à fortiori* therefore it follows, that he who steals goods belonging to a parish church may be indicted for stealing *bona parochianorum*. And it hath been adjudged, that he who takes off a shroud from a dead corpse may be indicted, as having stolen it from him who was the owner thereof when it was put on, for a dead man can have no property.

Hawk. P. C. c. 33, § 29, and several authorities there cited. See too Hickman's case, O. B. 1785, in 6th edit. of Hawk. P. C. Append. first, Sect. 13, note.

There is also a special case, in which a man may be guilty of felony in stealing goods, the absolute property whereof is in himself; as where one, who has delivered goods to a carrier or tailor, &c., afterwards, with an intent to charge such carrier or tailor, fraudulently and secretly takes them away.

Cro. Eliz. 536; Moor, pl. 981; Keilw. 70.

β Where a person purchased at a sale by auction a bureau, which was found to have money in a secret drawer, held that unless it was expressed to be a sale only of the bureau, the abstraction of the money could not amount to a larceny; *aliter*, if the buyer had such express notice, and he had no reason to believe that any thing more than the article itself had been sold.

Merry v. Green, 7 Mees. & W. 623.

If a bureau be delivered to a carpenter to repair, and he discover money in a secret drawer of it, which he unnecessarily breaks open, and converts the money to his own use, it is a felonious taking of property.

Cartwright v. Green, 2 Leech, Cr. Cas. 952.γ

||As to plundering wrecked vessels, it is now enacted by Sir Robert Peel's Larceny Act, 7 & 8 G. 4, c. 29, § 18, that if any person shall plunder or steal any part of any ship or vessel in distress, or wrecked or stranded, or any goods belonging thereto, every such offender shall suffer death as a felon; provided that when articles of *small value* shall be stranded or cast



## (C) What said to be a felonious Taking.

on shore, and shall be stolen without cruelty or violence, the offender may be punished as for simple larceny, and in either case may be indicted in the county in which the offence shall have been committed, or in any county next adjoining; and see also sections 19 and 20. The 20 G. 2, c. 19, § 1, 2, 3, 4, 8, on this subject is repealed by 7 & 8 G. 4, c. 27.

With respect to stealing fish, by § 34, of the 7 & 8 G. 4, c. 29, any person unlawfully taking or destroying fish in any water in any land adjoining to a dwelling-house shall be guilty of a misdemeanor, and punished accordingly; and any person unlawfully taking fish in any water in any other situation, but which shall be private property, shall forfeit any sum, not exceeding 5*l.*, which a justice shall think fit.

By Sir Robert Peel's act for improving the administration of criminal justice, 7 G. 4, c. 64, § 14, where a person is indicted for stealing the property of partners or tenants in common, it shall be sufficient to name one of the owners, and state the property to belong to such owner and others; and see also the same act, § 15 to 18, as to indictments for stealing the property of counties, ridings, parishes, townships, turnpike trustees, commissioners of sewers, &c.

There is no doubt that felony may be committed of goods, where the owner is unknown; but if he is described as a person unknown in the indictment, and it appears that his name is known, the prisoner must be acquitted.

3 Camp. 264; 1 Holt, 595.]

## (C) What shall be said to be a felonious and fraudulent Taking.

To constitute an offence felony, it is not sufficient that there be a fraud and (a) intent to steal, unless there be also a taking, for all felony includes trespass, and every indictment for larceny must have both the words *cepit et asportavit*; and therefore if there be no trespass in taking the goods, there can be no felony in carrying them away.

Keling, 24; H. P. C. 61; Hawk. P. C. c. 33. β To constitute a felony there must be a trespass in the original taking, which cannot be the case where the property has been previously delivered. State v. Braden, 2 Tenn. R. 68; Porter v. The State, Mart. & Yerg. 526; Wright v. The State, 5 Yerg. R. 154; Cassels v. The State, 4 Yerg. R. 149; State v. Long, 1 Hayw. 154; Dodd v. Hamilton, N. C. Term R. 31. But the taking may be actual or constructive; the former is when the thief without any pretence of a contract takes the property in question; the latter occurs when, under the pretence of a contract, the thief obtains the felonious possession of goods; as, for example, when under the pretence of hiring, he had a felonious design at the time of the pretended contract, to convert the property to his own use. Bouv. L. D. tit. *Taking*; Commonwealth v. James, 1 Pick. 375; Reg. v. Harvey, 9 C. & P. 353; Reg. v. Gruncell, 9 C. & P. 365; Reg. v. Jenkins, 9 C. & P. 38; Reg. v. White, 9 C. & P. 344; Reg. v. Heath, 2 Mood. C. C. 33. γ (a) But the bare intention to commit was holden so very criminal, that at common law it was punishable as felony, when it missed its effect through some accident, no way lessening the guilt of the offender. S. P. C. 17. And though at this day felony shall not be imputed to a bare intention to commit it, yet the party may be severely fined for such an intention. Lev. 46; Sid. 23; 5 Mod. 206, and by a statute 7 Geo. 2, c. 21, an assault with an intent to rob is felony, and punishable by transportation for seven years.

|| An assault with intent to rob is now punishable by 7 & 8 G. 4, c. 29, § 6, by transportation for life, or for not less than seven years, or imprisonment not exceeding four years, and if the offender is a male, by being once, twice, or thrice whipped.]

Therefore if a person finds goods, and converts them to his own use *animo furandi*, yet he is not guilty of felony.

3 Inst. 103; H. P. C. 61; β Porter v. The State, Mart. & Yerg. 526, *acc.* But it

(C) What said to be a felonious Taking.

has been held in New York, that when property is left through inadvertence with a person, and he conceals it *animo furandi*, he is guilty of a felonious taking, and may be convicted of larceny. 17 Wend. 460. And the finder of goods, who appropriates them to his own use, without inquiry for the owner, is guilty of larceny. Reg. v. Reed, 9 C. & M. 306.

So, if a person who has a limited property in the goods, as one who has goods delivered to him to keep; a carrier who has a box delivered to him to carry to a certain place; or a tailor who has cloth delivered to him to make into a suit of clothes; for here the party injured must seek redress by civil action, and must abide the folly of his own act in placing confidence in the person who was guilty of the breach of trust.

S. P. C. 25, 2; 3 Inst. 108.

||But it is otherwise if he know the owner, or if there are marks by which the owner may be found.

8 Ves. 405; 2 Leach, C. C. 952; 2 East's P. C. 664; Archbold's C. L. 121; Anon. cor. Lawrence, J., 1804; Rex v. James, cor. Gibbs, J., 1812; 2 Russ. on Cri. 102.

If the owner of the goods deliver them to the party accused of stealing, in any transaction of such a nature as to pass *the property* by the delivery, the taking and converting them cannot be felonious, although the owner were induced by fraud to part with them. As where a prisoner rode away with a horse from a fair after it was sold to him, without paying the purchase-money, this was held no felony.

Harvey's Ca., 1 Leach, 467; 2 East, P. C. 669; and see the other cases, 2 Russ. on Cri. 109, *et seq.*

But where the transaction is not of that nature which passes the *property* in the goods, but only the *possession*, if the possession is obtained by a fraud practised on the owner *cum animo furandi*, here the obtaining the goods is felony. As where a hosier by desire of the prisoner took a variety of silk stockings to his lodgings, where the prisoner pretended to purchase some of them, and set them apart from the rest, and then, having sent the hosier to fetch more, decamped with the stockings, this was held felony; since there was no change of *property*, and the possession was obtained by a preconcerted fraud, and with felonious intent.

Rex v. Sharpless, 1 Leach, 93; 2 East, P. C. 675; and see the other cases of this class, 2 Russ. on Cri. 119, *et seq.*; Archbold's C. L. 123.

Where the original delivery of the goods was not obtained fraudulently, the question whether a felony has been committed upon them by the party to whom they were delivered, depends on the point whether the lawful possession acquired by the delivery of them has been determined, and whether there has been any new and felonious taking of them. If the lawful possession has not been determined, the goods remain in the possession of the party to whom they were delivered as *bailee*, and while such possession continues, felony cannot be committed of them; and such lawful possession is not determined by the mere ending of the object of the bailment, if the goods remain still in the hands of the bailee. Thus if a party without fraud borrow or hire a horse to go to a certain place, and after going there, and returning accordingly, take the horse in a different direction and sell it, it is now settled not to be felony, though formerly held otherwise; for there was no original felonious intent, and the lawful possession was not at an end.

Rex v. Banks, MS. Bayley, J., Russell & Ry. 441; and see Russ. on Cri. 132, and Leigh's Ca. MS. Bayley, J., *Ibid.*||

(C) What said to be a felonious Taking.

But though, if I send a box to the carrier, and the carrier sells it, this is not felony; yet, if the box be broken open and the goods in it carried away, it is (a) felony; for he hath property in the box to carry it to the place appointed, but he hath no property in the goods in the inside, for that I have reserved in my own power, having locked it up out of the power of the carrier to whom it is sent; for no man hath property that is shut out from the command of the thing to which he pretends. So, if a carrier carries the goods to the place, and then steals them, this is felony; because the property is determined when the goods are come to the place appointed; besides, it is for public convenience, that the inside of the box should be thus secured; otherwise the carrier might steal the things contained in the box, and yet deliver the box itself, which would not be of very easy discovery.

13 E. 4, 9, 10, S. P. C. 25 a; Kelyng, 35; Ro. Abr. 73. *2* Commonwealth v. Brown, 4 Mass. 580; Commonwealth v. James, 1 Pick. 375. A servant, employed by a common carrier to drive a team to a certain place, who drives to any other place than that to which he was engaged to drive, and fraudulently takes the whole load and converts it to his own use, is guilty of felony. *Idem*; Commonwealth v. Baldwin, 8 Mass. 518; Reg. v. Harvey, 9 C. & P. 353; Reg. v. Jenkins, 9 C. & P. 38. *(a)* So, where a weaver who has received silk to work, or a miller who has corn to grind, fraudulently and clandestinely take and embezzle part, it is felony; for in such case, the possession of such part, distinct from the whole, was gained by their own wrong, and in a manner more base than if they had been strangers. Hawk. P. C. c. 33, § 5. [Where A intending to go a distant journey, hires a horse, fairly and *bonâ fide*, for that purpose, and evidences the truth of such intention by actually proceeding on his way, and afterwards rides off with the horse, it is no theft; because the felonious design was hatched subsequent to the delivery, and the delivery being obtained without fraud or design, the owner parted with his possession as well as his property; O. B. 1784, p. 1294, and thereby gave to A dominion over the horse, upon trust, that he would return him when the journey was performed. O. B. 1786, p. 333, 334. But, if the delivery of property be obtained with a preconcerted design to steal the thing delivered, although the owner, in this case, parts with the thing itself, he still retains, in law, the constructive possession of it. And where the delivery of property is made for a certain, special, and particular purpose, the possession, except for such purpose, is still supposed to reside, unparted with, in the first proprietor. See several instances, 1 Hawk. P. C. c. 33, § 5, note 6th edition.]

|| But the privity of contract, and, consequently, the lawful possession may be determined before the completion of the bailment, by the tortious act of the bailee, and in such case the taking may be felony. Thus where a warehouseman had wheat delivered to him in bags for safe custody, without any authority to sell or to show samples, took all the wheat out of some of the bags and sold it, this was held a felony, and the judges thought there was no difference whether the whole or a part were taken out of any one bag. But in such cases it must appear that the packages have been broken, and the goods taken out; for according to the carrier's case, it is not felony to take away the whole package.

Rex v. Brasier, 1817; Russ. & Ry. 337; and see Hale, P. C. 505; 2 East, P. C. 685

And, accordingly, where the master and owner of a ship disposed of some casks of butter delivered to him to carry, and made a false pretext that he had thrown them overboard, the judges held it no larceny, since it did not appear that he took the goods out of their packages.

Rex v. Maddox, Russ. & Ry. 92.||

He who has the bare charge of goods, as a shepherd has of his sheep, or a butler of plate, or that has only the special use of goods, as a guest in an inn, and not the possession, may be guilty of larceny, in fraudulently taking them away; for the offence comes as properly under the word *cepit*, and the

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fraud is as secret, and the villany more base than if it had been done by a stranger.

Moore, 24t; Poph. 84; Hawk. P. C. c. 33, § 6, and note in 6th edit. <sup>β</sup> One was employed to get staves upon the land of another, upon contract to have one half for getting them: held that while they remained on the land undivided, the manufacturer was neither a tenant in common with the owner of the land, nor a bailee of the staves, and therefore he, or any other person with his connivance might be guilty of larceny in taking them. State v. Jones, 2 Dev. & Bat. 544.g/

If he who, intending to steal goods, obtains a delivery of them from the sheriff, by virtue of a replevin, or by way of execution of a judgment obtained by imposition on a court, without any colour of title, by false affidavits, &c., he may be indicted as having feloniously taken them, for the law will not endure to have its justice eluded by such shameful evasions.

3 Inst. 108; H. P. C. 63; Kelyng. 43; Sid. 254; Raym. 276.

Also, he who steals goods from one who had stolen them from me, may be indicted as having stolen them from me: because in judgment of law both the possession and property of them was always in me; and for this cause, he that steals goods in the county of A, and carries them into that of B, may be indicted in (a) either.

Hawk. P. C. c. 33, § 9. (a) But a pirate carrying to land the goods taken at sea by piracy cannot be indicted at law, as having taken the goods at land, because the original taking was not such, whereof the common law takes consuance. 3 Inst. 113, but for this vide tit. *Piracy*.

It was formerly a doubt, whether a lodger, by reason of the special property he had in the furniture of his lodgings, could be guilty of felony in taking them away; but now by the 3 & 4 W. & M. c. 9, it is enacted, "That if any person or persons shall take away, with an intent to steal, embezzle, or purloin, any chattel, bedding, or furniture, which by contract or agreement he or they are to use, or shall be let to him or them to use in or with such lodgings, such taking, embezzling, or purloining shall be, to all intents and purposes, taken, reputed, and adjudged to be larceny and felony, and the offender shall suffer as in case of felony."

Kelyng. 24; Show. 50, 57; Hawk. P. C. c. 33, § 10. [The offender must be a lodger at the time the larceny is committed. O. B. 1785, No. 74. The indictment also must set forth the name of the person by whom the lodgings were let. O. B. 1784, No. 747. And the property stolen must be such as may reasonably be construed the furniture of the sort of lodging taken. 1 Hawk. P. C. c. 33, § 10, note.]

||Several points of nicety and difficulty (b) having arisen on the construction of the 3 & 4 W. & M. c. 9, as to felony by lodgers, that statute is now repealed by the 7 & 8 G. 4, c. 27, and Sir Robert Peel's Larceny Act, 7 & 8 G. 4, c. 29, § 45, has substituted a more simple and comprehensive enactment, and provided that the indictment shall be in the common form as for larceny. The statute enacts that if any person shall steal any chattel or fixture let to be used with any house or lodging, every such offender shall be guilty of felony, and punishable as for simple larceny; and it shall be lawful to prefer an indictment in the common form as for larceny, and as if the person was not a tenant or lodger, and to lay the property in the owner or person letting to hire.

(b) See Russ. on Cri. 246, and cases there cited.||

By the 7 Jac. 1, c. 7, it is enacted, "That if any sorter or kember, &c., of wool, or weaver of yarn, &c., shall embezzle it, &c., and shall be convicted before two justices of peace, he shall be whipped."

See too 17 Geo. 3, c. 56.

By the (c) 21 H. 8, c. 7, if a servant (being of the age of eighteen years,

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and not an apprentice) shall have a (*d*) casket, jewel, or money, or goods, or chattel of the master delivered to him by the (*e*) master to (*g*) keep, and such servant withdraw himself from the master, and go away with such casket, &c., to the intent to steal the (*h*) same and defraud the master, &c., or else being in the (*i*) service, without assent of the master, embezzle the same casket, or any part thereof, or otherwise (*k*) convert the same to his own use, with the like purpose to steal it, he shall be guilty of felony, if such casket, &c. be of the value of 40s.

(*c*) The benefit of clergy was taken away from all felonies within this statute by 27 H. 8, c. 17, and restored by 1 E. 6, c. 12, but taken away again by 12 Ann. c. 7, from all such as shall be committed in a dwelling-house or outhouse. (*d*) Extend not to choses in action. Dyer, 5; Hawk. P. C. c. 33, § 14. (*e*) If delivered by a servant to a servant to keep, it is within the statute; for the delivery of such servant is the delivery of the master. Hawk. P. C. c. 33, § 13. (*g*) Therefore a receiver, who receives his master's rents, and runs away with them; or, a servant, who being intrusted to sell goods, or to receive money due on a bond, sells the goods, &c., are not within the statute. Dyer, 5 pl. 2, 3; H. P. C. 62, 63; 3 Inst. 105. (*h*) Includes not the wasting or consuming of goods howsoever wilful it may be. H. P. C. 63. (*i*) Must be servant both at the time when the goods were delivered and when they were stolen. H. P. C. 63. (*k*) It hath been holden, that if a servant, who hath corn or money delivered to him by the master to keep, of his own head make the corn into malt, or melt down the money into plate, and then go away with it, he is not within the statute, because the property was altered. 5 H. 7, 16 a; Crom. 50; Dalt. c. 102, but *qu.* for Hawkins seems to be of a contrary opinion, and says it comes within the reason of those cases which have been adjudged within the statute; as where a servant makes up his master's cloth, delivered to him to keep, into a suit of clothes, or his leather into shoes, and then goes away with them. So, where the servant changed his master's money delivered to him to keep, from silver into gold, and then goes away with it. Hawk. P. C. c. 33, § 15.

||The 21 H. 8, c. 7, as to stealing by servants is repealed by 7 & 8 G. 4, c. 27, and by 7 & 8 G. 4, c. 29, § 46, it is enacted that if any clerk or servant shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master, he shall be liable to be transported for not exceeding fourteen years, nor less than seven; or to be imprisoned not exceeding three years; and, if a male, to be once, twice, or thrice whipped. ||

[To the foregoing larcenies by breach of trust by lodgers and menial servants, the legislature has added two others, viz., by officers or servants employed to transact the business of the bank of England, stat. 15 Geo. 2, c. 13, § 12; and by officers or servants employed in the post-office, stat. 5 Geo. 3, c. 25, § 17, and 7 Geo. 3, c. 50.]

||The provisions of the Bank Statute, 15 G. 2, c. 13, § 12, are repeated in the 35 G. 3, c. 66, § 6, and 37 G. 3, c. 46, § 6, (which make certain annuities created by the parliament of Ireland transferrable, and the dividends payable at the Bank of England,) with respect to effects deposited in pursuance of those acts. And there is a similar provision in the 24 G. 2, c. 11, § 3, with respect to the officers and servants of the South Sea Company.

It seems, that a note once cancelled by the Bank of England, is not a note within the meaning of the 15 G. 2, c. 13; and the person offending against that act must be a person *intrusted* with a note, and not merely having access to it.

Rex v. Bakewell, Russ. & Ry. 35; and see Aslett's Ca. 2 Leach, 954; 1 New R. 1; Russ. & R. 67.

Clandestinely taking away articles in order to induce the owner, a girl, to fetch them, and thereby give the party an opportunity to seduce her, is not a felonious taking.

Rex v. Dickinson, 1820, MS., Bayley, J., Russ. & Ry. 420.

## (C) What said to be a felonious Taking.

So, where the captain of a ship, taken as a prize, secreted some of the cargo, and clandestinely removed it from the ship, it being doubtful whether he did so for his own benefit, or for that of his owners, he was recommended for a free pardon; but the majority of the judges were of opinion that if the goods had been secreted for his own benefit, it would have amounted to larceny.

Rex v. Van Muyen, Russ. & Ry. 118.

And, where a person stole certain articles, and also took a horse, not with the intention of stealing it, but merely to get off more conveniently with the stolen goods, this was holden not to be a felonious stealing of the horse.

Rex v. Crump, 1 Car. & P. 658.

Where A, at the instigation of a police officer, concerted with three persons to commit a felony, in order that the officer might apprehend them, and upon their conviction receive the reward, which was to be divided between the officer and A, and A with the others did commit the felony, it was holden by a majority of the judges that A had not the felonious intention necessary to make him a principal, (although he acted from a bad motive, namely the reward,) because he was not present to aid and assist, but to detect, and had no intention that the felons should be successful.

Rex v. Dannelly, Russ. & Ry. 310; 2 Marsh. 571.

There are cases, however, which go to establish that it is not necessary that the taking should be *lucri causâ*, if it be fraudulent, and with intent wholly to deprive the owner of his property. Thus, where a prisoner, to screen his accomplice, who was indicted for horse stealing, broke into the prosecutor's stable and took away the horse, which he backed into a coal pit and killed, it was objected at the trial that this was not larceny, because the taking was not with intent to convert the horse to the use of the taker, *animo furandi et lucri causâ*. Seven of the judges held that it was larceny, and six of that majority were of opinion, that to constitute larceny it was not essential that the taking should be *lucri causâ*, if it were fraudulent, and with intent wholly to deprive the owner of the property; but some of this majority thought that the object of the prisoner might be deemed a benefit or *lucri causâ*.

Rex v. Cabbage, Russ. & Ry. 292.

Again, where the prisoners, servants in husbandry, opened the granary of their master by means of a false key, and took thereout two bushels of beans to give to their master's horses, in addition to the quantity usually allowed, this was holden larceny by a majority of the judges; but it was alleged by some of the judges, that the additional quantity of beans would diminish the work of the men who had to look after the horses, and therefore the "*lucri causâ*," to give themselves ease, was an ingredient in the offence.

Rex v. Morfit et al., Russ. & Ry. 307.¶

§ In order to constitute larceny, the property stolen must be taken *invito domino*, this is the very essence of the crime. The difficulty is to ascertain what is without this consent of the owner, as, for example, when he leaves property purposely exposed, in order to detect the thief.

See Bouv. L. D. tit. *Invito Domino*; Dodd v. Hamilton, N. C. Term R. 31; 2 Bailey's R. 569; Fost. 123; Russ. on Cr. 66, 105; 2 Leach, 913; 2 East, P. C. 666; Alis. Princ. of the Cr. Law of Scotl. 273; 2 Bos. & Pull. 508.

(D) What shall be said to be a carrying away.

Where a party, about to receive a sum of money, taking a receipt with him, ready signed, the payer laid down part of the money, and asked to look at the receipt, and then refused to pay the sum remaining due or to return the receipt, and the prosecutor stated that he should not have parted with the receipt unless he had been paid in full; this was held to constitute a larceny of the receipt.

Reg. v. Rodway, 9 C. & P. 784.

The finder of goods lost appropriating them to his own use, without any attempt to discover the owner, is guilty of larceny.

Reg. v. Reed, 1 Carr. & M. 306. See *contra*, Tyler v. The People, 1 Breese, 227.

Where the prisoner selected a pin, as for purchase, and it was set aside for him, and he afterwards was seen to take it away in the absence of the shopman, and a bill was afterwards sent to him including the price of the pin; held that the jury were to find whether it was taken with a felonious intent, or whether credit was given for it.

Reg. v. Box, 9 C. & P. 126.

The prisoner, not the servant of the prosecutor, was intrusted to carry a parcel containing notes, to a coach-office, and he abstracted the notes, held to amount to larceny.

Reg. v. Jenkins, 9 Car. & P. 38.

A defendant who took an article delivered to him in his capacity of servant, for the purpose of removing it from one room to another, and who converted the same to his own use, was held to be guilty of larceny.

United States v. Clew, 4 Wash. C. C. R. 700.

A employed B to take a canal-boat from S to E, paid him his wages in advance, and gave him besides three sovereigns to pay the tonnage dues, B took the boat part of the way, paid tonnage dues to the amount of 2*l.*, and appropriated the other sovereign to his own use: held a larceny.

Reg. v. Goode, 1 Car. & Marsh. 582.

A servant was sent with 6*s.* to buy twelve hundred weight of coals. He bought a smaller quantity for which he gave 3*s.* 3*d.*, and appropriated one shilling to his own use: held a larceny.

Reg. v. Beaman, 1 Carr. & M. 595.

(D) What shall be said to be a carrying away.

ALTHOUGH the word *asportavit* be (a) necessary in every indictment for this species of felony, (b) yet the felony lies in the very first act of removing the property; for if the felon be caught in the act of carrying the goods away before he is out of the house, it is felony; for the act of the mind declared by subsequent facts makes the crime.

(a) 3 Inst. 108; 2 Vent. 215. (b) 27 Ass. 39, S. P. C. 26 a; Bro. Coron. 107; Hawk. P. C. c. 33, § 18.

Hence it hath been adjudged, that where a guest who had taken off the sheets from his bed with an intent to steal them, and carried them into the hall, but was apprehended before he could get out of the house, was guilty of larceny.

2 Inst. 109; Dalt. c. 102; Hawk. P. C. c. 33, § 18.

So, where a person having taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close.

3 Inst. 109.

(E) By whom the Offence may be committed.

So, if a person pulls off the wool from another's sheep, or strips their skins, with an intent to steal them, he is guilty of felony.\*

Dalt. 21; Crom. 36. \* By 14 G. 2, c. 6, whoever steals, or kills with intent to steal, any part of any sheep or other cattle, or assists in so doing, is guilty of felony, without clergy.—Ten pounds reward on every conviction to be paid by the sheriff in a month; on default he forfeits double the sum, and treble costs.—By 15 G. 2, c. 31, the word cattle in the above act declared to extend to bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever.

Also, where a person intending to steal plate, took it out of a trunk, wherein it was, and laid it on the floor, but was surprised before he could carry it away: it was adjudged felony.

Kelyng. 31. [A man was detected in taking a bale of goods in a wagon. It appeared that the bale lay horizontally, and that he had set it on its end. As it had not been removed from the *spot*, it was holden, on a case reserved, that it was not a sufficient carrying away. But where a man, with a felonious intention, had removed goods from the head to the tail of a wagon, it was adjudged to be a sufficient removal to constitute a carrying away. O. B. 1784. So, a diamond ear-ring snatched from a lady's ear, but lodging in the curls of her hair, and not taken by the thief, was holden to be a sufficient asportation. O. B. 1784; 1 Hawk. P. C. c. 33, § 18, note, 6th edition.]

§ To remove a package from the head to the tail of a wagon; sheets from a bed and carry them in an adjoining room; to take plate from a trunk and to lay it on the floor with intent to take it away, have been respectively holden to be felonious, when the removal has been with a felonious intent.

1 Leech, 220, 226, 320; 2 Chit. Cr. Law, 919.

Where, however, there has not been a complete severance of the possession, this is not a complete carrying away.

2 East, P. C. 556; 1 Hale, 508; 2 Russ. on Cr. 96; Rex v. Welsh, 1 R. & M. C. C. 14.

||Where the prisoner had lifted up a bag from the bottom of the boot of a coach, and was detected before he got it out of the boot, and it did not appear that the bag was completely removed from the space which it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space which that specific part occupied; the judges held, that there was a complete *asportavit*.

Rex v. Welsh, 1824, MS., Bayley, J., Ry. & Moo. C. C. 14.

Where the defendant drew a book from the inside pocket of the prosecutor's coat about an inch above the top of the pocket, but whilst the book was still about the person of the prosecutor, the prosecutor suddenly put up his hand, on which the defendant let the book drop, and it fell into the prosecutor's pocket; this was considered a sufficient asportation to constitute larceny.

Rex v. Thompson, Ry. & Moo. C. C. 78.

(E) By whom the Offence may be committed.

ALL those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion\*, idiots, and lunatics, are not punishable by any criminal prosecution whatsoever, and consequently cannot be guilty of felony.

H. P. C. 10; Hawk. P. C. c. 1. But for this vide the heads of *Infancy and Age*, and of *Idiots and Lunatics*.—\*But a court and jury will, from circumstances, judge whether he is or is not of discretion. See Foster, fo. 70, &c., the case of William Yorke.



(E) By whom the Offence may be committed.

|| Though voluntary drunkenness cannot excuse, yet where, as upon a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated is a circumstance to be taken into consideration.

Rex v. Grindley, 1819, MS.; 1 Russ. on Cri. 8. As to the degree of insanity which shall excuse a party, see 1 Russ. on Cri. 10, 11, &c.; Collis on Lunacy, 673, and the cases there collected; and see 39 & 40 G. 3, c. 94, as to the disposal of persons acquitted on the ground of lunacy.

It is no excuse for a wife that she committed the offence by the husband's order and procurement, if she committed it in his absence; at least it is not to be presumed in such case that she acted by coercion. Sarah Morris was tried for uttering a forged order, knowing it to be forged, and her husband for procuring her to commit the offence; and it appeared that her husband ordered her to do it, but that she uttered the instrument in his absence. Upon a case reserved, the judges held that the presumption of coercion at the time of uttering did not arise, as the husband was absent, and that the wife was properly convicted of uttering and the husband of procuring.

Rex v. Morris, 1814, Russ. & Ry. 270; and see Rex v. Hughes, MS.; 1 Russ. on Cri. 18; Rex v. Squire *et ux.*, Ibid. 16; and see tit. *Baron and Feme*, (G) vol. i.

Evidence of cohabitation and reputation are sufficient proof of the marriage in such cases.

Rex v. Atkinson, MS.; 1 Russ. on Cri. 20.||

Also, a feme covert is so much favoured, in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft in company with, or by coercion of her husband.

Kelyng. 31; S. P. C. 26; Hawk. P. C. c. 1, § 9. β A feme covert is not liable for a larceny committed jointly with her husband. Commonwealth v. Trimmer, 1 Mass. 476.γ

But, if she be guilty of treason, murder, or (a) robbery, in company with, or by coercion of her husband, she is punishable as much as if she were sole.

S. P. C. 65; Hawk. P. C. c. 1, § 11. (a) But not if she be guilty of burglary with him. Kelyng. 31.

Also, a feme covert may be guilty of larceny, if she of her own voluntary act, or by the bare command of her husband, steal the goods of a stranger, but not if she steal her husband's, because a husband and wife are considered but as one person in law; and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them; for which cause, even a stranger cannot commit larceny in taking the goods of the husband by the delivery of the wife, as he may by taking away the wife by force and against her will, together with the goods of the husband.

S. P. C. 65; Hawk. P. C. c. 1, § 11, c. 33, § 19.

β Where the wife made arrangement for the removal of boxes containing the husband's money and property, with an intention of going away and living in adultery with the prisoner, who had directed her to bring away all the money she could, held to be a larceny by him, although no actual criminal intercourse might have taken place.

Reg. v. Follett, 1 Carr. & M. 112; see Reg. v. Tolfree, Mood. 243; The People v. Schuyler, 6 Cowen, 572.γ

(F) Of what Value the Things must be: and herein of the Difference between Grand and Petit Larceny.

A PERSON who steals the goods of another, let the value of them be never (*a*) so small, is guilty of felony; but it is (*b*) said to be no felony for one reduced to extreme necessity to take so much of another's victuals as will save him from starving.\*

(*a*) Hal. P. C. 69. (*b*) Crom. 33; Dalt. c. 99. But if such necessity be owing to his unthriftiness, it is far from being an excuse. Hawk. P. C. c. 33, § 20.—\*This doctrine is now antiquated, the law of England admitting of no such excuse at present. Black. Com. 4. v. 31, and cites 1 Hal. P. C. 51.

But here we must observe the difference between grand and petit larceny, which is again divided into simple and mixed larceny.

Simple grand larceny is the felonious and fraudulent taking and carrying away the personal goods of another, not from his person, nor out of his house, where the goods are above the value of twelve pence, but if of that value, or under, then it is petit larceny; if from his person, or out of his house, it is called mixed larceny, but hath no greater degree of guilt attending it at common law than simple larceny; for in both cases the offender was allowed the benefit of his clergy: but is at this time, in several instances, excluded by acts of parliament.

S. P. C. 27; Crom. 33; H. P. C. 71; Hawk. P. C. c. 33, § 31.

If two or more persons together steal goods above the value of 12*d.*, every one of them is guilty of grand larceny, for each person is as much an offender as if he had committed the fact alone.

S. P. C. 24; Crom. 36; H. P. C. 70; *State v. Humphreys*, 1 Tenn. R. 306.*g*

Also, if one at several times steal several parcels of goods, each under the value of 12*d.*, but amounting in the whole to more, from the same person, and be found guilty thereof on the same indictment, he shall have judgment of death as for grand larceny.

S. P. C. 24; Crom. 36; H. P. C. 7. But this severity is seldom used, Hawk. P. C. c. 33, § 33. [But it is now settled, that the stealing must be to that amount at one and the same particular time.]

If one be indicted for stealing goods to the value of ten shillings, and the jury find specially that he is guilty, but that the goods are worth but ten pence, he shall not have judgment of death, but (*c*) only as for petit larceny.

Hedl. 66; Hawk. P. C. c. 33, § 35. (*c*) Petit larceny is not punished with the loss of life or lands, but only with the forfeiture of goods and whipping, or other corporal punishment. H. P. C. 70; Hawk. P. C. c. 33, § 36. It is now, by 4 G. 1, c. 11, and 6 G. 1, c. 23, punishable by transportation for seven years.

||By 7 & 8 G. 4, c. 29, § 2, the distinction between grand and petit larceny is abolished, and every larceny, whatever the value of the property, shall be subject to the incidents of grand larceny; and every court whose power was limited to trying petty larceny, shall have power to try any offence of larceny, the punishment of which cannot exceed the punishment by that act awarded for simple larceny; that is, (by § 3,) transportation for seven years, or imprisonment not exceeding two years; and, if a male, to be once, twice, or thrice whipped in addition to imprisonment.||

(G) Where the Offender is or is not excluded his Clergy.

By the common law, a person guilty of any crime, which subjected him to the loss of life or member, was allowed his (*d*) clergy, except in high\* treason and sacrilege.

11 Co. 29; 2 Inst. 634. For the more accurate knowledge hereof, vide 2 Hawk. P. C. c. 23. (*d*) None were entitled to this privilege but ecclesiastics; but as the clergy

## (G) Where the Offender excluded his Clergy.

were judges hereof, they extended this privilege to the clerk that set the psalm, the door-keeper, the exorcist, the subdeacon, the reader, &c., and as they extended it too far, it was necessary to restrain them; and therefore the temporal and ecclesiastical power joined in making the reading before the secular and spiritual judge the test of their being ecclesiastics; for it was a strong presumption, in those times of ignorance, that a man was an ecclesiastic if he could read; and therefore the reading was before the secular judge; but the attestation, that he could read, was by the ordinary.—By the 21 Ja. 1, c. 16, and 3 & 4 W. & M. c. 9, women (the better half of the human race, Fost. Cr. Law, 305) shall have this privilege in such cases as men; but by 1 & 5 W. & M. c. 24, § 15, only once. β In North Carolina, women are entitled to the benefit of clergy. State v. Gray, 1 Mur. 147. See State v. Kearney, 1 Ruff. 53.γ By the 1 E. 6, c. 12, a lord of parliament shall have this privilege, though he cannot read, without burning in the hand.—And by 5 Ann. c. 6, if any person, convict of such felony for which he ought to have his clergy, pray the benefit of that act, he shall not be required to read, but shall be punished as a clerk convict.—A person is not entitled to this privilege more than once. 4 H. 7, c. 13.—Where it may still, in certain cases, be allowed to one actually in holy orders, vide 28 H. 8, c. 1; 32 H. 8, c. 3; 1 E. 6, c. 12.—And how a former allowance thereof is to be proved and certified, vide 34 & 35 H. 8, c. 14; 2 & 3 E. 6, c. 33; and 3 & 4 W. & M. c. 9.—(\*) But see Fost. Cr. Law, 190. β The benefit of clergy seems never to have been extended to the crime of high treason, nor to misdemeanors inferior to felony. 1 Chit. Cr. Law, 667, 668; 4 Bl. Com. Ch. 28. But this infamous privilege given originally to the clergy is now abolished in England by stat. 7 Geo. 4, c. 28, s. 6. By the act of Congress of April 30, 1790, it is provided, § 30, that the benefit of clergy shall not be used nor allowed, upon conviction of any crime, for which, by any statute of the United States, the punishment is, or shall be declared to be, death.γ

And therefore it may be laid down as a good general rule, that wherever a person is denied the benefit of his clergy, as he is in petit treason, murder, robbery, burglary, arson, &c., such denial must be grounded on some act of parliament, which excludes him from the benefit of it.

H. P. C. 232; 2 Hawk. P. C. c. 33, § 23.

It is also a general rule, that where an offence is made felony by statute, it shall have the benefit of clergy, unless expressly excluded.

H. P. C. 230; 2 H. H. P. C. 330, 334, 335; 3 Inst. 39, 73; Kel. 104; 2 Hawk. P. C. c. 33, § 24.

So, wherever a person is denied the benefit of the clergy in respect of a statute excluding it from the crime charged against him, the indictment or appeal, and the evidence thereon, must expressly bring his case within the words of such statute.

2 Hawk. P. C. c. 33, § 25.

A statute, by excluding principals from their clergy, doth not thereby exclude the accessaries before or after, *et sic e converso*; and a statute generally excluding those who shall be found guilty of murder, robbery, or burglary, or other crime, without saying any thing of accessaries, shall be construed to intend principals only.

2 Hawk. P. C. c. 33, § 26.

Where clergy is allowable, those who stand mute or challenge above twenty, or are outlawed, are as much entitled to it as those who are convicted.

2 Hawk. P. C. c. 33, § 27.

Also, a statute, by taking away clergy from those who shall be found guilty, doth not thereby take it from those who stand mute, or challenge above twenty, or are outlawed; but a statute taking it from those who shall be found guilty, extends as well to those who shall confess themselves guilty upon record, as to those who shall be found guilty by verdict.

2 Hawk. P. C. c. 33, § 28.

(G) Where the Offender excluded his Clergy.

But what we are chiefly to take notice of here are the several cases in which, by statute, the benefit of clergy is taken away from this species of felony called larceny.

And first by the 8 Eliz. c. 4, it is enacted, "That no person, who shall be indicted or appealed for felonious taking (a) any money, goods, or chattels from the person of any other, (b) privily without his knowledge, in any place whatsoever, and thereupon found guilty by verdict of twelve men, or shall confess the same upon his or their arraignment, or will not answer directly to the same, according to the laws of the realm, or shall stand wilfully, or of malice, or obstinately mute, or challenge peremptorily above the number of twenty, or shall be upon such indictment or appeal outlawed, shall be admitted to his clergy."

(a) Yet if the jury find the offender guilty under the value of 12*d.* he shall not have judgment of death, but only as of petit larceny. Hawk. P. C. c. 36, § 4; H. P. C. 75. (b) The offence must be laid to be done *clam* and *secretè*, in exact pursuance of the statute, otherwise the party shall have the benefit of his clergy. H. P. C. 75; Hawk. P. C. c. 36, § 3.—And therefore, if a man takes off another's hat from his head and runs away with it, or comes into a shop and cheapens goods, and runs away with them without paying for them, it is not within the statute, nor indeed an offence indictable as a felony; but rather a trespass, unless the offender were either unknown, or immediately fled the country if he were known. Dyer, 224; 2 Ro. Rep. 154; H. P. C. 73; Raym. 275.

By the 1 E. 6, c. 12, and 2 & 3 E. 6, c. 33, horsestealers are excluded the benefit of their clergy, and by the latter of these statutes it is enacted, "That all persons feloniously taking or stealing any horse, gelding, or mare, shall not be admitted to the privilege of the clergy, but shall be put from the same in like manner and form as though they had been indicted or appealed for felonious stealing of two horses, two geldings, or two mares, of any other, and thereupon found guilty by verdict of twelve men, or confessed the same upon their arraignment, or stand wilfully or of malice mute."

\*By 3 W. & M. c. 9, "If any one shall steal goods from any shop or warehouse belonging to a *dwelling-house* to the value of 5*s.*, he shall not be entitled to his clergy, *although no person shall happen to be within.*" Stat. 10 & 11 W. 3, c. 23, besides including *coach-houses* and *stables*, does not make it necessary, that the shop or warehouse *shall be belonging to the dwelling-house*, which is required by 3 & 4 W. & M. c. 9;—and I the rather take notice of this distinction between the two laws, as Mr. Justice Foster has reported in his Crown Law, fol. 78, a decision at the Old Bailey, in July, 1751, *that this statute does not extend to any warehouse which is a mere repository for goods, but only where merchants and traders deal with and sell to their customers.* It should seem, however, that these *distant warehouses* were those expressly, which were intended to be protected by this statute; as the shop or warehouse *belonging to a dwelling-house* was before protected by 3 & 4 W. & M. c. 9, and the more distant the warehouse, the more probable it is that it should be broken open.

See Observations on the Statutes, p. 288, ed. 1766.\*

By the 10 & 11 W. 3, c. 23, (commonly called the *shoplifting act*.) "All persons, who by night or day shall in any *shop, warehouse, coach-house, or stable* privately and feloniously steal any goods, wares, and merchandises of the value of 5*s.*, or more, though such shop, &c., be not broken open, and though the owner or any other person be not in such *shop, &c.*; or that shall assist, hire, or command any person to commit such offence, being thereof convicted, or attainted by verdict or confession, or being indicted thereof

(H) Where the Offender is to be transported.

shall stand mute, or challenge above twenty of the jury, shall be excluded from the benefit of the clergy."

And by the 12 Ann. c. 7, it is enacted, "That every person who shall feloniously steal any money, goods or chattels, wares or merchandises of the value of 40s., or more, being in a dwelling-house, or outhouse thereunto belonging, although such house or outhouse be not actually broken by such offender, and although the owner of such goods, or any other person or persons, be or be not in such house or outhouse, or shall assist or aid any person or persons to commit any such offence, being thereof convicted or attainted by verdict or confession, or being indicted thereof shall stand mute, or shall peremptorily challenge above the number of twenty returned to be of the jury, shall be absolutely debarred of and from the benefit of the clergy, &c. *Provided*, that nothing in this act shall extend to apprentices under the age of fifteen years, who shall rob their masters as aforesaid."

By the 22 Car. 2, c. 5, it is enacted, "That no person who shall be indicted for feloniously cutting and taking, stealing or carrying away any cloth, or woollen manufactures from the rack or tenter in the night-time, and thereupon found guilty by verdict of twelve men, or shall confess the same on arraignment, or will not answer directly to the same according to the law of the realm, or shall stand wilfully of malice mute, or challenge peremptorily above the number of twenty, or shall be upon such indictment outlawed, shall be admitted to the benefit of the clergy; and by the same act to steal or embezzle any of his majesty's sail, cordage, or any other his majesty's naval store, is excluded the benefit of the clergy."

That all persons, who shall steal any goods out of any parish church, or other church or chapel, are in all cases excluded the benefit of the clergy.

Vide 2 Hawk. P. C. c. 33, § 72, 73, 74, 75, 76.

|| By Sir Robert Peel's act for further improving the administration of justice in criminal cases, 7 & 8 G. 4, c. 28, § 6, it is enacted that benefit of clergy with respect to persons convicted of felony shall be abolished, but that nothing herein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of this act.

And by § 7, no person convicted of felony shall suffer death unless for some felony excluded from clergy before or on the first day of the present session of parliament, or made punishable with death by some statute passed after that day.

And by § 8, persons convicted of felony not punishable with death, shall be punished in manner prescribed by the statute specially relating to such felony; and where no punishment is prescribed shall be punishable under this act by transportation for seven years, or imprisonment not exceeding two years; and, if a male, to be once, twice, or thrice publicly whipped, in addition to such imprisonment.

By the statute 7 & 8 G. 4, c. 27, the several acts 3 & 4 W. & M. c. 9; 4 & 5 W. & M. c. 24; 1 Edw. 6, c. 12; 34 & 35 H. 8, c. 14; 2 & 3 Edw. 6, c. 33, cited at page 192, respecting benefit of clergy, are repealed; and so also the 8 Eliz. c. 4; 10 & 11 W. & M. c. 23; 12 Ann. c. 7; 22 Car. 2, c. 5, set forth under tit. "FELONY" (G).||

(H) Where the Offender is to be transported.

It is enacted, by 4 Geo. 1, c. 11, and 6 Geo. 1, c. 23, "That where any person or persons shall be convicted of grand or petit larceny, or any felonious stealing or taking of money, goods, or chattels, either from the person

(H) Where the Offender is to be transported.

or in the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of the clergy, and liable only to the penalties of burning in the hand or whipping, (except persons convicted for receiving or buying stolen goods, knowing them to be stolen,) it shall and may be lawful for the court before whom they were convicted, or any court, held at the same or any other place, with the like authority, if they think fit, instead of ordering any such offenders to be burnt in the hand, or whipt, to order and direct that such offenders shall be sent, as soon as conveniently may, to some of his majesty's colonies and plantations in America for the space of seven years; and that court before whom they were convicted, or any subsequent court, with like authority as the former, shall have power to convey, transfer, and make over such offenders, by order of court, to the use of any person or persons who shall contract for the performance of such transportation to him or them, and his and their assigns, for such term of seven years; and where any person shall be convicted for any crimes, for which they are excluded their clergy, and the king shall extend his mercy to them upon condition of transportation to any part of America, and such intention of mercy be signified by a principal secretary of state, it shall be lawful for any court, having proper authority to allow such offenders the benefit of a pardon, to order and direct the like transportation to any person, who will contract for the performance thereof, of any such offenders; as also of any person convict of receiving or buying stolen goods, knowing them to be stolen, for the term of fourteen years, in case such condition of transportation be general, or else for such other term as shall be made part of such condition; and such person so contracting, and his assigns, shall have an interest in the service of the said offenders for such term of years; and if any such offender return into Great Britain or Ireland, before the end of his term, he shall be liable to be punished as any person attainted of felony, without the benefit of clergy, &c. Provided, that the king may pardon and dispense with any such transportation, and allow of the return of such offender, paying his owner, at the time, such sum as shall be adjudged reasonable by any two justices of the peace, where such owner dwells, and where any such offenders shall be transported, and shall have served their terms, such services shall have the effect of a pardon, as for the crimes for which they were transported."

[Though transportation was not established by legislative authority before 4 G. 1, yet long before that time, (probably from the original planting of colonies in the West Indies,) transportation was frequent, as appears from the introduction to *Kellynge's Reports*. *Per Gould, J.*, 2 H. Bl. Rep. 223.]

*And it is further enacted*, "That every such person, to whom any such court shall order any such offenders shall be transferred or conveyed, shall, before such offenders shall be delivered to them, contract with such person as shall be appointed by such court, and shall give sufficient security, to the satisfaction of such court, for the transporting such offenders to some plantation in America, to be ordered by such court, and the procuring an authentic certificate from the governor, or chief custom-house officer, of the place of the landing of such offenders, &c., and their not returning by the wilful default of such contractor."

*And it is further enacted*, by 6 Geo. 1, c. 23, "That the court may nominate two or more justices of the peace, for the place where such offenders shall be convicted, who shall have power to contract with any person or persons for the performance of the transportation of such offenders, and to

## (H) Where the Offender is to be transported.

order such and the like security, as the said former act directs, to be taken by order of court, and to cause such felons to be delivered to such contractors; which said contracts and security shall be certified by the said justices to the next court, held with like authority, to be filed, &c."

*And it is further enacted*, "That all charges, in or about such contracts, &c., shall be borne by each county, &c., for which the court was held, and that the respective treasurers shall pay the same; and that all securities for transportation shall be by bond in the names of the clerks of the peace, &c., and the money recovered shall be to the use of the respective counties."

*And it is further enacted*, "That the person so contracting, &c., may carry such offenders towards the sea-port, &c., and that if any person shall rescue such offenders, or aid them in making their escape, &c., they shall be deemed guilty of felony without clergy; and that if any felon ordered for transportation shall be afterwards at large within any part of Great Britain, without some lawful cause, before the expiration of his term, and be lawfully convict thereof, he shall suffer death without clergy, and may be tried before justices of assize, *oyer* and *terminer*, or jail-delivery, for the county where he shall be apprehended, &c., or from whence he was ordered to be transported, &c., and that the clerk of assize, and clerk of the peace, where such orders of transportation shall be made, shall, on request of the prosecutor, &c., certify briefly a transcript, containing the tenor of every indictment, conviction, and order of transportation, to the justices of assize, &c., which shall be sufficient proof of such conviction and order of transportation."

16 G. 2, c. 15; 24 G. 3, sess. 2, c. 56, § 5.

[It is provided by the 8 Geo. 3, c. 15, that where any offender shall be convicted without benefit of clergy, and the judge shall grant a reprieve, if the king shall afterwards pardon such offender on condition of transportation, and such intention shall be signified by a secretary of state to the judge recommending mercy, such judge may make an order for the immediate transportation of the offender, in like manner as if such intention had been signified during the continuance of the assizes at which the offender was convicted.]

In consequence of the defection of the American colonies, the laws upon this subject have undergone considerable alterations, for which see the statutes of 19 Geo. 3, c. 74; 24 Geo. 3, sess. 2, c. 56; 25 Geo. 3, c. 46; 27 Geo. 3, c. 2; 28 Geo. 3, c. 24; 30 Geo. 3, c. 4; and 34 Geo. 3, c. 60.]

|| By the 5 G. 4, c. 84, reciting that the laws regulating transportation were about to expire, and consolidating all provisions on the subject into that one act; § 1. It is enacted, That the act shall take effect on the last day of that present session of parliament, and from that day all things remaining to be done touching the punishment, imprisonment, transportation, &c. of persons sentenced to transportation under any acts theretofore or then in force, shall be continued and done under that act. By § 2, offenders adjudged for transportation are to be transported under the provisions of that act, and also offenders receiving a conditional pardon, concerning whom an allowance and order may be made by a subsequent court. By § 3, places for transportation are to be appointed by his majesty, by and with the advice of the council, either within or without his

majesty's dominions, and a secretary of state may authorize persons to contract for the transportation of offenders. Provision is then made by § 4, 5, 7, for delivery of offenders to the contractors by the sheriff or jailer, and for the giving security by the contractors. Authority is given (§ 6) to punish offenders misbehaving on the voyage, and a property in their services during the term of transportation is vested in the governor of the colony or his assignees, (§ 8.) By § 10 his majesty may appoint places of confinement in England and Wales, either at land or on board of vessels for male offenders, and regulations are made as to the removal and confinement of the offenders there; (see the provisions of this act stated at large, and also as to the offence of returning from transportation.)(a)

For a more full abstract of this act, see 1 Russ. on Cri. 394. The earliest act inflicting the punishment of transportation is 39 Eliz. c. 4; 6 Ev. Stat. p. 852. (a) 1 Russ. on Cri., book 2, ch. 35.

By the 7 & 8 G. 4, c. 29, § 2, the punishment of simple larceny is transportation for seven years, or imprisonment for two years with whipping, (if a male,) in addition to imprisonment.

By 7 & 8 G. 4, c. 28, § 6, benefit of clergy is abolished.

And by § 8, every person convicted of felony not punishable by death, shall be punished as prescribed by the statute relating to the offence, or if no punishment be prescribed shall be punished in the same manner as for simple larceny; (and see as to the several offences punishable with transportation for fourteen years and for life. Russell on Crimes, 2 edit.; Archbold, Crim. Law.)||

#### β (I) Legal consequences of Felony.

A justice of the peace convicted of felony of maliciously stabbing another, was sentenced to the penitentiary, confined there, and then pardoned: held that this conviction and judgment of felony was a forfeiture of his office of justice of the peace, and the pardon neither avoided the forfeiture nor restored his capacity.

Commonwealth v. Fugate, 2 Leigh, 724.g

## FELO DE SE.

A PERSON who wilfully destroys himself is termed a *felo de se*, and is said to be guilty of the worst sort of (a) murder, as he acts against the first principle of reason, which is that of self-preservation.

Plow. 261; Dame Hale's case. (a) Yet in some cases it is considered as a different offence; and therefore if the king pardons all crimes, except murder, this offence shall be pardoned; for though in a strict sense it may be called murder, yet according to the common acceptance of words, the offence of a person who murders another, and that of *felo de se*, are considered as distinct offences, and as such are distinctly treated of by authors who have written of these matters: as Stam. P. C. 183, &c. Besides, the end of excepting murder seems to be, that the offender may be brought to justice, and that the law of God and Nature, which require blood for blood, may be satisfied; but the discharging of a chattel, or pardoning of a forfeiture, is not of any such consequence; also it hath been held by divines, that pardoning murder draws *periculum animarum* with it as being contrary to the law of God, which requires blood for blood. The King v. Ward, Lev. 8; Sid. 150; Keb. 66, 548, S. C. adjudged.—It is also in common parlance taken as a distinct offence from other felonies; and therefore a grant of *bona et*



(A) Where a Person shall be said to be *Felo de se*.

*catalla felonum* will not carry the goods of a *felo de se*. Sid. 420; Vent. 32; Saund. 274, adjudged.  $\beta$  The case of Commonwealth v. Brown, 13 Mass. 386, seems scarcely consistent with this doctrine. If one advise another to commit suicide, and the other in consequence of this advice kill himself, the adviser is guilty of murder. Now the adviser in this case cannot at most be more than a principal before the fact; and if he is nothing more, then the *felo de se* must be guilty of murder. $\gamma$

In treating of this Offence, it will be necessary to consider,

(A) Where a Person shall be said to be a *Felo de se*.

(B) Of the Manner of finding him such.

(C) What he shall forfeit for this Offence.

(A) Where a Person shall be said to be *Felo de se*.

No person can be *felo de se*, who is under the age of discretion, or *non compos* at the time he commits the fact; and therefore if an infant kill himself under the age of discretion, or a (a) lunatic during his lunacy, he cannot be a *felo de se*.

Crom. 30, 31; II. P. C. 28; 3 Inst. 54. (a) In 3 Mod. 100, it is said to be the prevailing opinion, that a person who kills himself must be *non compos* of course, on this supposition, that it is impossible a man in his senses should do a thing so repugnant to nature and reason; but in Hawk. P. C. c. 27, § 3, this notion is justly exploded. 4 Bl. Comm. 189.

Not only he who deliberately kills himself, but also he who maliciously attempting to kill another happens to kill himself, is a *felo de se*; as if A discharge a gun at B, with an intent to kill him, and the gun burst and kill A, or if A strike B to the ground, and then hastily falling upon him, wound himself with a knife which B happens to have in his hand, and die; in both these cases A is *felo de se*, for he is the only agent.

44 E. 3, 44; 44 Ass. 55; Bro. Coron. 12, 14; Dalt. c. 92.

But, if a man be killed by hastily running on a knife or sword which a person assaulted by him, and driven to the wall, holds up in his defence, he shall not be adjudged a *felo de se*, but the other shall be judged to have killed him *se defendendo*.

Stamf. P. C. 16; II. P. C. 28; Pult. 119 b; Crom. 28, cont. 3 Inst. 54.

If one person kills another, though by his desire and entreaty, yet the person so killed is not a *felo de se*, but he who killed him is as much a murderer as if he had acted out of his own head; for every assent of that kind is void, being against the laws of God and man.

Keilw. 136.

But, if two persons agree to die together, and one of them, at the persuasion of the other, buys ratsbane, and mixes it in a potion, and both drink of it, and he who bought and made the potion survives, by using proper remedies, and the other dies, it seems the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner.

Moore, 754, pl. 1041; Hawk. P. C. c. 27, § 6.

|| If a man encourage another to murder himself, and is present abetting him while he does so, such a man is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, but

(B) Of the Manner of finding him such.

the other fails in the attempt on himself, he is a principal in the murder of the other.

Rex v. Dyson, Russ. & Ry. 523.

By the 4 G. 4, c. 52, the coroner shall no longer issue any warrant directing the interment of any person found *felo de se* in any public highway, but the coroner shall give directions for the private interment of the remains of such person, without any stake driven through the body, in the churchyard of the place where the person might by law or custom be interred if not *felo de se*, such interment to be made within twenty-four hours from the finding the inquisition, between nine and twelve at night, the rights of Christian burial not to be performed on such interment.||

(B) Of the Manner of finding him such.

No person can be a *felo de se* before he is found such by some inquisition, which ought regularly to be by the coroner *super visum corporis*, if the body can be found.

II. P. C. 29; 3 Inst. 35.

But, if the body cannot be found, so that the coroner, who has authority only *super visum corporis*, cannot proceed, the inquiry may be by justices of the peace, who by their commission have a general power to inquire of all felonies; or in the King's Bench, if the felony were committed in the county where the said court sits; and such inquisitions are traversable by the executors, &c.

3 Inst. 55; II. P. C. 20; 2 Lev. 141; Hawk. P. C. c. 27, § 12.

But it was formerly holden that, with regard to the high credit which the law gives to inquests found before the coroner, no such inquest found before him could be traversed. But this has been ruled otherwise of late, and it seems now settled, that such inquest being moved into the King's Bench by *certiorari*, may be there traversed by the executor or administrator of the person deceased, or by the king or lord of the manor, &c. (a)

8 E. 4, 4 a; Bro. Coron. 151; 2 Lev. 141, 152; 2 Keb. 859; 2 Jon. 198; Vent. 278; 3 Keb. 564, 566, 604, 800; Skin. 45. || (a) But no traverse can be taken to make a man *felo de se*; as, if the inquisition find that the party was *non compos mentis* at the time he did the act, neither the king nor his grantee can traverse it. Anon. 1 Ventr. 239; Fost. Cr. L. 266.||

All inquisitions of this offence, being in the nature of indictments, ought particularly and certainly to set forth the circumstances of the fact, as the particular manner of the wound, and that it was mortal, &c., and in the conclusion add, that the party in such manner murdered himself.

Salk. 377.

And therefore if either the premises be insufficient, as, if it be found that the party flung himself into the water, *et sic seipsum emergit*, which is nonsense, because *emerge* signifies only to rise out of the water; or if there be wanting the proper conclusion, *et sic seipsum murtheravit*, (b) the inquisition is not good.

R. v. Parker, 2 Lev. 140. || (b) So in R. v. Aldenham, 2 Lev. 152, and 3 Keb. 604, the inquisition was quashed for omitting this conclusion. But it is not added in the inquisition set out in Hales v. Petit, Plowd. 255 a; nor in that of Toomes v. Etherington, 1 Saund. 353. In R. v. Warner, 1 Keb. 66, Twisden, J., held it not necessary; and in Reg. v. Clerk, 1 Salk. 377, and 7 Mod. 16, the Court of K. B. held the inquisition good without it.||

Yet if it be full in substance, the coroner may be served with a rule to amend a defect in form.

Vide 2 Lev. 152; Sid. 225, 259; Keb. 907; 3 Mod. 101; Salk. 377; Fitzgib. 6.

|| If the coroner's inquest omit finding the goods of the *felo de se*, it may be supplied, it seems, by a writ of *melius inquirendum* directed to the sheriff.

1 H. II. P. C. 415.||

(C) What he shall forfeit for this Offence.

A *felo de se* forfeits all chattels real or personal which he hath in his own right, and also all such chattels real whereof he is possessed, either jointly with his wife, or in her right; and also all bonds, and other personal things in action, belonging solely to himself; and also all personal things in action, and, as some say, entire chattels in possession, to which he was entitled jointly with another, on any account, except that of merchandise. But it is said, that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed as executor or administrator.

Stamf. P. C. 188, 189; II. P. C. 29; Plow. 243, 262; Crom. 31 a; 3 Inst. 55; 19 H. 6, 47 a; 8 E. 4, 24 b; Raym. 7.

But the blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife deprived of her dower.

Plow. 261.

Also, no part of the personal estate is vested in the king before the self-murder is found by some inquisition; and, consequently, the forfeiture thereof is saved by a pardon of the offence before such finding.

5 Co. 110; 3 Inst. 54; Saund. 362; Sid. 150, 162; 2 Mod. 53; 3 Mod. 100, 241, *cont.* Lev. 8; Keb. 67, 68.

But, if there be no such pardon, the whole is forfeited immediately after such inquisition, from the time such mortal wound was given, and all intermediate alienations are avoided.

Plow. 260; 5 Co. 110. For process from the crown-office against a debtor of *felo de se*, vide Saund. 273.

## FEOFFMENT.

As all property in lands began by occupancy, so it seems the first method of transferring property was by investiture; for as no man could originally appropriate, but by settling himself in the possession and application of it to his own use, so no man could transfer but by a solemn and public delivering over the possession, and the ceremony used in such act of delivery is in our law called livery and seisin, and is thus defined, *solemnis rei feudalis traditio sub præstatione fidei coram testibus vassalo facta*.

Spelm. Gloss. 510.  $\beta$  Feoffment is a gift of any corporeal hereditaments to another; it also signifies the instrument or deed by which such hereditament is conveyed. Bouv. L. D. h. b. The conveyance by feoffment, with livery of seisin, has long since

## (A) The several Sorts of Livery in our Law.

become obsolete in England, and in this country it has not been used in practice. See Cruise's Dig. t. 32, c. 4, s. 3; Touchs. ch. 9; 4 Kent, Com. 467; Dane's Ab. c. 104, a. 3, s. 4.*g*

The end and design of this institution was, by this sort of ceremony or solemnity, to give notice of the translation of the feud from one hand to another: because if the possession might be changed by the private agreement of the parties, such secret contracts would make it difficult and uncertain to discover in whom the estate was lodged, and, consequently, the lord would be at a loss of whom to demand his services; and strangers equally perplexed to discover against whom to commence their actions for the prosecution and recovery of their right; to prevent therefore this uncertainty, the ceremony of livery and seisin was instituted.

This method of conveyance was made use of before men were acquainted with letters, and therefore it was required to be on the land, or near the land, that the other tenants of the manor might be witnesses of it, who in those days were called to the lord's court, to determine all controversies relating to such translation; and though after the use of letters a charter of feoffment was introduced, yet was not this necessary, but only tended to the authentication or evidence of it; and so our law determined, before the statute of frauds and perjuries, as is observed hereafter.

For the better understanding this method of conveyance, we shall consider,

## (A) The several Sorts of Livery in our Law: And herein,

1. *Of Livery in Deed.*
2. *Of Livery within View, or in Law.*

## (B) The Effect and Operation of Livery: And herein,

1. *The Effect thereof to pass a future Interest.*
2. *The Operation thereof, where the Feoffor is out of Possession.*
3. *In what Cases several Parcels will pass by one Livery, or where several Parties may take by Livery to one.*

## (C) Of the Charter of Feoffment; and herein what things are necessary to the making of a perfect Charter, and how far the Charter governs the livery which is relative to it.

## (D) Who may make a Feoffment.

## (E) Of making it by Letter of Attorney.

## (A) The several Sorts of Livery in our Law: And herein,

1. *Of Livery in Deed.*

THE livery in deed is the actual tradition of the land, and is made either by the delivery of a branch of a tree, or a turf of the land, or some other thing, in the name of all the lands and tenants contained in the deed; or it may be made by words only, without the delivery of any thing; as, if the feoffor being upon the land, or at the door of the house, says to the feoffee, I am content that you shall enjoy it according to the deed, or enter into this house or land, and enjoy this land according to the deed; this is a good livery to pass the freehold; because in all these cases, the charter of feoffment makes the limitation of the estate, and then the words spoken by the feoffor, on the land, are a sufficient *indicium* to the people present, to determine in whom the freehold resides during the extent of the limitation. Be-

(A) The several Sorts of Livery in our Law.

sides, the words, being relative to the charter of feoffment, plainly denote an intention to enfeoff.

Co. Lit. 48 a; 6 Co. 137 b. Thoroughgood's case, 6 Co. 26; Sharp's case, 2 Ro. Abr. 7, and vide Cro. Ja. 80, which seems *cont.*

But, if a man without any charter, being in his house, says, I here demise you this house, as long as I live, paying 20*l.* *per ann.*; this passes no freehold, but only an estate at will, because the word *demise* denotes only the extent of the limitation of the estate intended to be conveyed; but bare words of limitation, without some act of words to discover the intention of the feoffor to deliver over the possession, are not sufficient to convey the freehold. For if a charter of feoffment be made to a man and his heirs, this, without some other act or words to give the possession, only passes an estate at will, because the act of delivery is requisite to the perfection of the charter; so that, besides the charter of feoffment, there must be some act or words to deliver over the possession before the feoffee can enjoy it pursuant to the charter.

6 Co. 26; 2 Ro. Abr. 7; Co. Lit. 48; Cro. Eliz. 482; 9 Co. 138; Moore, 458.

But, if the feoffor had delivered the charter *upon the land* in the name of seisin of all the lands comprised in the deed, this had been good to execute the deed, and to give livery also; because the bare delivery of the deed is good to execute it as a deed, and the delivery of the deed or any other thing, in the name of seisin of the land, is sufficient to give livery, because the intention of those solemn acts is only to discover to all persons in whom the freehold is lodged; and this end is as effectually answered by the delivery of a deed, or any thing else in the name of a seisin, as of a turf or a twig, the one being equally visible and notorious as the other.

9 Co. 137 b, 138 a; Co. Lit. 48 a, 57 a; 2 Ro. Abr. 7; 6 Co. 26.

A, being seised of lands in fee, borrowed 20*l.* of B, and for repayment agreed to assure him the land; and thereupon they both went to the land, where A said to B, I am indebted to you 20*l.*; and if I do not pay you before Michaelmas, then I bargain and sell this land to you, and if I pay you then, I shall have my land again; and then put B in possession of the land. This was holden a good livery, because here the possession was actually delivered pursuant to the agreement of assuring the land for the security of the money, which possession was to be revested on the payment of the money by A, the feoffor.

Moore, 144; Keale's case; Cro. Eliz. 25.

## 2. Of the Livery within View, or the Livery in Law.

The livery within view, or the livery in law, is when the feoffor is not actually on the land, or in the house, but, being in sight of it, says to the feoffee, I give you yonder house or land, go and enter into the same, and take possession of it accordingly. This sort of livery seems to have been made at first only at the court barons, which were anciently holden *sub dio* in some open part of the manor, from whence a general survey, or view, might be taken of the whole manor, and the *pares curiæ* easily could distinguish that part which was then to be transferred.

Pollex. 47.

But this sort of livery is not perfect to carry the freehold till an actual entry made by the feoffee, because the possession is not actually delivered to him, but only a license of power given him by the feoffor to take posses-

## (A) The several Sorts of Livery in our Law.

sion of it ; and therefore, if either the feoffor or feoffee die before an entry made by the feoffee, the livery within the view becomes ineffectual and void. For if the feoffor dies before entry, the feoffee cannot afterwards enter, because then the land immediately descends upon his heir, and, consequently, no person can take possession of his land without an authority delegated from him who is the proprietor. Nor can the heir of the feoffee enter, because he is not the person to whom the feoffor intended to convey his land, nor had he any authority from the feoffor to take the possession. Besides, if the heir of the feoffee were admitted to take possession after his father's death, he would come in as a purchaser, whereas he was mentioned in the feoffment to take as the representative of his ancestor, which he cannot do since the estate was never vested in his ancestor.

Co. Lit. 48 b ; 2 Ro. Abr. 3, 7 ; Vent. 186 ; Moore, 85 ; Pollex. 48.

But, if the feoffee, in such case, dare not enter into the land without peril of his life, he may claim the land, as near as he may safely venture to go ; and this shall be sufficient to vest the possession in him, and render the livery within view perfect and complete. For nobody is obliged to expose his life for the security of his property ; but when he has gone as far as he may with safety, the law very reasonably looks upon such intention to be as effectual as the act itself ; for otherwise it might be in the power of a man, by his own act of violence, to deprive another of his right, and thereby to receive an advantage from an unlawful act.

2 Ro. Abr. 3 ; Co. Lit. 48 b.

If a man delivers a charter of feoffment to his feoffee, within view, and says, I will that you have the lands which you see there, the which are comprised in this charter, according to the purport of the charter, this is a good livery within view ; for the charter of feoffment fully denotes the intention to enfeof, and the words are a license to the feoffee to enter into the land, and to take the possession thereof, according to the charter.

2 Ro. Abr. 7.

But, if the feoffor had only delivered the charter of feoffment within view, and only showed the feoffee the lands, without saying any thing, though the feoffee had actually entered into the land, and the feoffor had afterwards agreed to the entry, yet this it seems is no good feoffment ; because the bare showing of the lands to the feoffee implies no authority or license from the feoffor to take possession ; and, consequently, the entry being without any authority cannot vest the freehold in him, because there was no solemn act, nor public declaration made by the feoffor, by which the *pares* might discover a real intention to change the possession, and the subsequent agreement of the feoffor can never support an act which was originally void. For though the feoffee, after the delivery of the charter, might take the usufructuary possession as tenant at will, yet the freehold still continued in the feoffor, for that cannot pass from one to another without some solemn or public declaration, that the *pares* may, upon any dispute, determine in whom the freehold resides.

2 Ro. Abr. 7 ; 2 Co. 55 b.

If a man makes livery within view to a woman, and before she enters, the feoffor marries her, and afterwards never claims any thing but in right of his wife, this is a good execution of the livery ; for the husband claiming the land, in right of his wife, shall be sufficient to reduce the lands actually into her possession, since he is the proper person to transact for her ; and

## (B) The Effect and Operation of Livery.

therefore shall be presumed to have parted with and delivered up the possession to her, since after the coverture he claimed the land only in her right.

Perk. § 214; 2 Ro. Abr. 3; Bro. Feoffment, 57; Vent. 186; Pollex. 53.

So, where two women were jointenants in fee, and one of them made a feoffment to a man, and livery within view, by saying, Go enter, and take possession, and before the man entered, he married the feoffor; his entry after the marriage was a good execution of the livery, because, by the livery within the view, an interest passed to the feoffee, which is not revocable by the feme; and his entry after the coverture makes the utmost notoriety the thing is capable of to discover in whom the freehold is lodged; and his entry shall be intended for his benefit; and therefore shall have a retrospect to the livery in view to make it a perfect feoffment.

Parsons v. Perns, Mod. 91; 2 Keb. 872, 880, S. C.; Vent. 186, S. C.; Pollex. 45 to 53, S. C.

The livery within view may be made of lands in another county than where the lands lie, because the translation of the feud was often made at the court baron in the presence of *pares curiæ*; and these courts being holden *sub dio*, the *pares* could have a distinct view of every part of the manor; and therefore were proper to attest this sort of investiture, though the lands were in a different county; for, notwithstanding that, they might have been part of the same manor for which the court was holden.

Co. Lit. 48 b.

## (B) The Effect and Operation of Livery: And herein,

### 1. *Of the Effect thereof to pass a future Interest.*

THIS ceremony was first instituted, that the *pares* of the county might, upon any dispute relating to the freehold, determine in whom it was lodged, and thence be the better enabled to determine in whom the right was. Hence therefore it is, that if a man makes a feoffment, or lease for life, to commence in *futuro*, and makes livery immediately, the livery is void, and only an estate at will passes to the feoffee; for the design of the institution would fail, if such livery were effectual to pass the freehold; for it would be no evidence or notoriety of the change of the freehold, if, after the livery made, the freehold still remained in the feoffor; the use of the investiture would rather create than prevent the uncertainty of the freehold, and in many cases would put men to fruitless trouble and expense in pursuit of their right; for by that means, after a man had brought his *præcipe* against a person, whom he supposed to be tenant to the freehold, and had proceeded in it a considerable time, the writ might abate by the freehold's vesting in another by virtue of a livery made before the purchase of the writ. Another reason why such future interests cannot be allowed to pass by any act of livery was, because no man would be safe in his purchase, if the operation of livery might create an estate, to commence many years after the livery was made; and though they have allowed a future interest, to commence by way of lease, yet that had no such ill effect in making purchases uncertain, because anciently they were under the power of the freeholder, who, by recovery, might destroy them; and now, unless such leases were made upon good considerations, they are fraudulent against a purchaser; and it is not to be presumed that leases at great distances should be purchased for value.

Cro. Eliz. 451; 2 Vent. 204; Co. Lit. 217; 5 Co. 94 b.

## (B) The Effect and Operation of Livery.

Hence, by the way, we may account why a freehold in reversion or remainder cannot be granted *in futuro*, though there no livery is necessary to pass it; as, where A was tenant for life, remainder to B in fee; A made a lease for years to C, and afterwards granted the land to D *habend.* from Mich. next ensuing for life: this grant to D was adjudged void, though C attorned to it after Michaelmas, because such future grants create an uncertainty of the freehold, and the tenant of the freehold being the person who is to answer the stranger's *præcipe*, and was answerable to the lord for the services, it were unreasonable to permit him, by any act of his own, to prevent or delay the prosecution of their right.

2 Co. 55; Buckler's case, 2 And. 29; Moore, 423; Cro. Eliz. 450, 585; Hob. 170, 171; 5 Co. 94; Ro. Rep. 261.

But, where a man makes a lease to commence from Michaelmas, and after Michaelmas makes a livery and seisin, this is sufficient to pass the freehold, because in this case, at the time of the livery made, the possession and freehold were actually transferred to the lessee, and did not remain in the lessor, after the notoriety made, which gives notice of transferring the freehold.

Greenwood v. Tyler, Hob. 314; Cro. Ja. 563, S. C.; Smith v. Bole, Cro. Ja. 458; 3 Bulstr. 290, S. C.

Yet, if the feoffor had made a letter of attorney to give livery, the attorney could not give livery after Michaelmas, unless an express authority were therein contained for it, because the natural import of such authority is to give livery immediately, and the authority of the representative cannot extend beyond the delegation.

Cro. Ja. 563; Hob. 314.

A by indenture demised to B *habend. a die datûs* (which was the 10th of June) *indenturæ prædict.* for his life, with a letter of attorney to make livery; the attorney made livery the 23d of July following, and the livery was holden to be void; because the estate for life being by the indenture to commence the 10th of June, the attorney had no authority to change the commencement of the estate; and therefore not having pursued his authority, by not giving livery to let the freehold commence according to the deed, what he did afterwards was without any authority, and, consequently, void. But in this case, if the deed had not been delivered till after the day of the date, and the attorney had given livery *at the time of the delivery of the deed*, this had been a good livery, because the deed of feoffment was to govern the livery, but the deed itself had no effect till the delivery; and therefore the attorney making the livery at the time the deed of feoffment, which was to govern it, began to operate, he seems thereby to have executed his authority well enough.

Hennings v. Paucharden, Cro. Ja. 153; Mellow v. May, Moore, 36; Cro. Eliz. 873, S. C.

If a man makes a feoffment to commence after his own death, or makes a feoffment in this manner, being upon the land, *I do here, reserving an estate for my own and my wife's lives, give you these my lands to you and your heirs*, these are void feoffments, because the possession is not delivered at the time of the notoriety made; and therefore, if such feoffments were allowed, the investiture would be so far from being an evidence to discover in whom the freehold is lodged, that it would often mislead the juries in such inquiries. Besides, it were absurd to suffer a man to reserve a par-



## (B) The Effect and Operation of Livery.

ticular estate to himself, and thereby in the same contract be both feoffor and feoffee.

Callard v. Callard, Cro. Eliz. 344; Poph. 47, S. C.; 2 Ro. Abr. 7, S. C.; Co. Lit. 48.

If a lease for years is made to A, the remainder to B for life, and livery is made, the freehold is well conveyed to B. But this livery cannot be made to B himself, because the possession cannot be delivered to him, for that belongs to A during the term. The livery therefore must be made to A, who is to receive the possession, and such livery actually vests the freehold in B, because the presumption is, that every man accepts of a gift which is for his interest; and A is looked upon as the attorney of B to take the livery, because he, having an immediate interest in the land, is the only person to whom the possession can be delivered; for B has no immediate right to the possession, and therefore, as he cannot receive it himself, by consequence he cannot depute another to take it.

Litt. § 60; 5 Co. 94 b; Co. Lit. 49; 2 Ro. Abr. 8.

But this livery must be made to A upon the land, for a livery within the view will not pass the freehold to B; for this livery within the view, being anciently made in court, could only be made by the immediate homagers of the court from the one to the other; but A in this case being no homager to the court, since he was only lessee for years, was not capable of such livery within view.

Co. Lit. 49 b; 2 Ro. Abr. 6.

And this livery to A must be made to him before he actually enters and takes possession, by virtue of the lease, because if the possession be once filled by the lessee for years, there is no vacant possession to be transferred by the livery, for *quod semel meum est, amplius meum esse non potest*; no man can receive that from another which is already in his possession.

Litt. § 60; Co. Lit. 49; 5 Co. 94; Moore, 14; Co. Lit. 216 a; Plow. 156 a.

If a lease for years be made to A and B, the remainder to C in fee, and livery be made to A in the absence of B, whether the conveyance be by deed or without, the livery is good to vest the remainder in C; because by the bare demise, A and B have an interest in the land, during the term, without any further ceremony, and each being equally entitled to the whole possession, either may invest himself in the whole possession by entry, or receive the possession from the lessor by the solemnity of livery; and, therefore, when the whole possession is delivered by the lessor, and livery made to A, in the absence of B, in the name of both, this livery is sufficient to vest the remainder in C, because A had as much power to receive the possession of the whole as if the lease for years had been made to him only, he and B being jointenants by the demise, and thereby seised *per my et per tout*.

Co. Lit. 49; 5 Co. 94; 2 Ro. Abr. 8.

But, if a lease for life had been made to C to commence immediately, and C had appointed A and B his attorneys to take livery from the lessor; the livery made to one of them alone had been ineffectual and void; because one only without the other had no authority from the delegation to receive the possession, and, consequently, what is done by a representative without an authority from the principal, is a nullity and void. But otherwise it is, if the letter of attorney had been jointly and severally, to receive livery.

Co. Lit. 49 b; Co. 94 b; Palm. 23.

## (B) The Effect and Operation of Livery.

If a lease for years be made to A, remainder to the right heirs of B, and livery and seisin be made to A, yet the freehold does not pass from the lessor; and therefore the livery is void, because there was no person in being at the time of the livery made in whom the freehold could vest, for *nemo est hæres viventis*; and the law will not endure such future operation of the investiture, because it would create an uncertainty of the freehold, which would necessarily perplex and delay all prosecutions against the freehold.

Co. Lit. 217 a.

If a lease for years be made to begin at Michaelmas, remainder to J S in fee, and livery be made before Michaelmas, the livery is void for the former reason; but a lease for years may be made to commence *in futuro*, because the freeholder, who is to answer the stranger's *præcipe*, is, notwithstanding such future interest, certain and known, and therefore not within the reason of the former case.

Plow. 156 a; Co. Lit. 217.

If A makes a lease for *five years* to B upon condition, that if B pays him 10*l.* within two years, that then he shall have a fee-simple in the lands, and makes livery and seisin to B; this passes the freehold immediately, and B has a fee conditional; because if the freehold were not to vest in B till the condition performed, it would be difficult to determine in whom the freehold is; for such conditions may be inserted in deeds, which are perfected privately between the parties, and therefore not so proper to govern the possession and seisin of the freehold, as the solemn investiture by livery, which is made in the public view of the whole county; therefore, as this solemnity was first appointed to give notice of the transferring of the freehold, it follows, that from the reason of the investiture the freehold must pass at the time of the solemnity made, or not at all. But, if A had made a lease *for life*, upon like condition, to have fee, the livery made thereon should not carry the inheritance till after the condition performed, because there passed a certain freehold, at all events, to the lessee, and the livery gave notice in whom it was lodged, so that no man can pretend ignorance against whom to bring his *præcipe*, which would be the mischief in the former case, if the freehold did not pass at the time of the livery made.

Lit. § 350; Co. Lit. 217.

## 2. The Effect of Livery when the Feoffor is out of Possession.

It is regularly true, that the feoffor must be actually in the possession of the land at the time of the livery made, or otherwise the livery will be ineffectual and void; because the design of the livery is to give notice of the change made of the possession, and therefore it must be a vacant possession that is delivered; but it were absurd, that a man should be permitted to transfer to another what he has not in himself. Wherefore if a man makes a lease for years, or life, of his land, or has his land extended by virtue of a statute merchant, &c., and makes a feoffment and livery, the conusee or lessee being in possession of the land, the livery is void; because the land is filled by the lessee; and, consequently, during the continuance of his interest, the feoffee cannot deliver a vacant possession; and therefore the livery, which is a solemnity instituted to give notice of the change of the possession, must be void.

Co. Lit. 48 b; 2 Ro. Abr. 3, 4; 7 H. 4, 19 b; Dyer, 33; Cro. Eliz. 322.

## (B) The Effect and Operation of Livery.

Thus, if there be lessee for years of a house and several closes, and the lessee and all his servants being in the house, the lessor enter into one of the closes, and make a feoffment of it, and give livery, this is a void feoffment: because the possession of part of the thing demised is possession of the whole; for the impossibility that a man should be in the actual possession of every part of the land at the same time; and, consequently, the lessor cannot take possession of the close, which was filled by his lessee; and therefore the livery must be void, because the feoffor had no vacant possession to transfer at the time of the livery made.

Bettisworth's case, 2 Co. 31 b; Moore, 250, S. C.; 2 Ro. Abr. 4, S. C.; Co. Lit. 48 b; Dyer, 18 b.

So it is, if the lessee for years himself had not been in the house, or any part of the land, yet if his wife, children, or servants had been on any part of the land, that were sufficient. But the cattle of the lessee grazing upon the land, without either wife or servant on the land, does not fill the possession so as to prevent the lessor from entering, and making a good livery to pass the freehold, because the cattle cannot be said to continue upon the land, *animo possidendi*, for the benefit of their master, as a servant may, and in duty ought to do.

Co. Lit. 48; 2 Ro. Abr. 4; Dyer, 18; Bro. tit. *Feoffment*, 66; but Moore; 11, says, "by some contra," but adds "qu."

But, if a man makes a lease for life of lands, and afterwards makes a feoffment of the same lands, and makes livery and seisin upon the land, by the assent of the lessee, and in his presence, this is a good livery to pass the inheritance; because the lessee's permitting the feoffor to come upon the land, and make livery, is a sufficient quitting of the possession to him, either by way of surrender, or to create a tenancy at will in the feoffor, to make the feoffment and livery more effectual and valid.

2 Ro. Abr. 5; Dyer, 18; Sheppard v. Gray, Bro. tit. *Surrender*, 48.

But, if the servant of the lessee were only on the land, the livery made by the feoffor, though with the servant's permission, had been void if the servant continued in possession at the time of the livery made; for while the servant continued in possession, it must be only for the use and benefit of him that placed him there; and, consequently, the possession of the servant must be looked upon as the possession of the master; and therefore the livery must be void, because it could not deliver a possession which was still filled by the master, and which the master never consented to part with; and the permission of the servant will not admit of such a construction as was made in the precedent case, because the servant having no interest, but in right of his master, could neither make a surrender, nor a tenancy at will to the feoffor.

2 Ro. Abr. 5.

But it has been holden, where a man made a lease for years of a house, and afterwards made a feoffment of it, with a letter of attorney to make livery, and the attorney came to the house to make livery in the absence of the lessee, and found nobody in the house but the servant of the lessee, who quitted the possession of the house at the desire of the attorney, and then the attorney made livery, which the master approved of at his return, saving his term; that this was a good livery; because here the servant actually quitted the house, and thereby the attorney had a vacant possession to deliver to the feoffee. So, if the attorney had found

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the lessee himself upon the land, and had entered and ousted him, and then made livery, that had been good to pass the freehold; for though the ouster had been a tortious act, yet the possession became thereby vacant, and, consequently, by the livery, might be delivered to the feoffee.

Dyer, 363 a; 2 Ro. Abr. 5; Moore, 91.

If there be A lessee for years of six acres, and he make a lease for years of three acres to J S, and he in reversion enter upon J S, and make a feoffment with livery, this shall pass the three acres: because, by the demise of A for years, the possession became separate and divided, which was united and one under the lease to A himself; and therefore A's continuing in possession of his own three acres could never be a possession of the other three, which he had no right to during the demise to J S. But, if A had only made a lease at will to J S of those three acres, the entry and livery of the reversioner had not passed them, because A is still supposed to be in possession of those three acres, since he may enter into them when he pleases, by the determination of his own will; for as no man can be actually upon every parcel of the land, the possession of one acre is very reasonably construed to be the possession of the whole.

2 Co. 32 a; 2 Ro. Abr. 4; Dyer, 18 b.

So it is in case of a tenant at sufferance; as, if tenant in tail makes a feoffment in fee to the use of himself in fee, and afterwards makes a lease for years, and dies, by which the issue is remitted before entry, and, consequently, the estate of the lessee for years is determined and changed into a tenancy at sufferance, because the fee simple, out of which it was derived, is vanished by the remitter; and the issue enters into part of the land descended, and makes a feoffment of the whole, and gives livery of that part into which he entered, in the name of the whole, this shall pass all the lands to which the issue was remitted, though the tenant at sufferance was in possession of part; because that possession may be reasonably supposed to be in me, which I may actually place myself in at my pleasure; and therefore the livery of that part, in which the issue had actually entered in the name the whole, shall pass all the lands.

Bridgman v. Charlton, 2 Ro. Abr. 5; 2 Ro. Rep. 260, S. C.; Moore, 846, S. C.

A seised of land in fee, holden of the queen in socage, died; and it was found by office, that he died without heir, by which the lands were seised as the escheat of the queen; and B the heir of A traversed the office, upon which issue was joined; and pending the issue, B made a deed of feoffment, with a letter of attorney; and afterwards the issue being for B, judgment was given *que les mains la R. soient amove*, and then the attorney made livery, after which the *amoveas manus* was executed; this was holden a good feoffment and livery; because, by the judgment against the queen, her possession was defeated, and B was restored to his right of possession, which he might have placed himself in at his pleasure; and therefore might transfer that to another which he might actually invest himself in at pleasure.

2 Ro. Abr. 5, 6, Terry v. Brown.

Thus, if land descends to J S, who enters but into part of it, and makes a feoffment of the whole, and livery in that part in which he entered in the name of the whole, all the land shall pass; for besides that, in this case, an entry into part may be construed an entry into the whole, the feoffor having a power to reduce the whole into his actual possession at his will; the very act of feoffment with the livery in all these cases may reasonably be taken

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to be a determination of his will to take the possession, since the livery and feoffment would be invalid, unless he were in possession.

2 Ro. Abr. 5.

If husband and wife be seised of land in fee, and the husband make a feoffment of the whole, the wife being upon the land, yet the livery shall pass the land, because the husband had the whole possession, either in his own right, or in right of his wife, and therefore could deliver it over by the investiture, though the wife should disagree to it.

2 Ro. Abr. 5; Perk. § 223.

If the queen be lessee for years, and he in reversion enter upon the land, and make a feoffment in fee, this is void: because the law preserves the possession for the queen, who, by constantly attending the business of the public, is presumed not to have leisure to take care of her private concerns. But, if the queen had made a lease for years to J S, and he in reversion had entered and ousted him, and made a feoffment, that had been good; because the queen had no right to the possession during the lease to J S, and the reversioner having gained the possession by his ousting J S, might consequently deliver it by the investiture.

2 Ro. Abr. 5; and vide 2 Co. 53.

If a man makes a lease for life to A, and after makes a feoffment, and livery to A of the land in lease, this is a good livery and feoffment; for though the land was in lease to A, yet his acceptance of the feoffment and livery amounts to a surrender, *ut res magis valeat*, and consequently, the feoffor has thereby possession to transfer by the livery to the feoffee.

2 Ro. Abr. 495; Dyer, 358; Moore, 636.

If a man be seised of two acres, and make a lease for years of one of them; and after make a feoffment of both acres, and livery of the acre in his own possession, in the name of both; the livery is void and ineffectual to pass the acre in lease, because that being full of the lessee, the feoffor had not the possession to transfer by the livery; *yet such feoffment is a good grant of the reversion of the leasehold acre, if the termor attorns*; because every man's act is construed most strongly against himself; and therefore the feoffor shall not be admitted to claim any thing in either of the acres, since the possession of the one was actually transferred by the livery, and the reversion of the other in lease by the deed of feoffment, which, with the attornment of the tenant, amounts to a grant.

Co. Lit. 49 a; 2 Ro. Abr. 56; Plow. 162.

But, if there be a lease for years to A, remainder to B for life, and C the reversioner in fee make a feoffment in fee, with livery to A, this is void as a feoffment, because C had no possession to transfer by the livery, that being already in A, and the freehold in B, by the former lease; and the acceptance of the livery by A was neither a surrender, nor an attornment; as in the former case it would not amount to a surrender, because of the intermediate freehold which was in B, nor did the feoffment amount to a grant and attornment; for though, according to the former case, every man's conveyance is construed most strongly against the grantor, yet in this case the grant is ineffectual, for want of attornment; for A's acceptance is no attornment, because he shall not bring B within his fealty, by an act which was not in its original intention designed to be prejudicial and injurious to B, by displacing his remainder.

2 Ro. Abr. 4, 56; Ro. Abr. 482; Eedes and Knotsford.

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If a man be seised of two acres, and, being disseised of one make a feoffment of both, and livery in the acre in possession, in the name of both, yet the acre of which he was disseised does not pass, because he could not deliver that possession to the feoffee, which the disseisor had. So it is, if the disseisor had made a lease at will, and then the disseisee had made a feoffment of the acre in his possession, in the name of both, this had not passed both the acres, because the possession of one acre was still out of him, and the feoffment could not be any determination of the will of the disseisor.

2 Ro. Abr. 6; Dyer, 18.

But, if a man be seised of two acres, and make a lease at will of one, and after enfeoff J S of both acres, this shall pass both; because the very feoffment and livery is a determination of the estate at will, and, consequently, the feoffor has thereby resumed the possession, in order to convey it by livery: otherwise, of a lease for years, because the possession is in the termor during the lease.

Dyer, 18; 2 Ro. Abr. 5.

If A be lessee for life of Black-Acre, and being likewise seised in fee of White-Acre make a feoffment of both, and give livery in White-Acre, in the name of both, this is a good feoffment of both acres; because A had the freehold and possession of both acres, and therefore might well deliver them over by the investiture; otherwise if A had been only possessed of Black-Acre for years, for then it should not pass by the feoffment, because the charter of feoffment passes the interest in the term before the livery made, and a less estate by right shall be supposed to pass, rather than a greater by wrong. But in the first case, where A had the freehold in both acres, nothing passes till the livery was made: and therefore the livery must operate to pass the fee in both acres, *secundum formam chartæ*, else it can pass nothing.

2 Ro. Abr. 6; 9 H. 7, 25 b.

But, if A had been possessed of Black-Acre for years in *auter droit*, as guardian to an infant, and had made a feoffment of both acres, and given livery in White-Acre, in the name of both, that had passed both acres to the feoffee; because the term being vested in the infant, the guardian could lawfully transfer it as if he had been in possession of it in his own right, and therefore the livery must operate to *oust the infant* of his term, and *disseise him in reversion*, else it will have no effect at all.

2 Ro. Abr. 4.

3. In what Cases several Parcels will pass by one Livery, or where several Parties may take by Livery to one.

It seems that anciently the feoffment and giving livery was performed before the *pares* of the manor where the lands lay. But this being found too much to strengthen the transferring of the possession, it was found necessary to admit the testimony of strangers; and this came afterwards to be established for the conveniency of it. And because all men of the county assembled at the county-court, in order to determine disputes relating to the whole county, as the tenants of the manor did at their court baron; and because there lay an appeal from the court baron to the county court, so that the *pares* of the county were thereby ultimately to determine of all things relating to the particular manor; it seemed the more reasonable to admit the *pares comitatus* to attest the investiture through any particular

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manor, and indifferently through the whole country; and hence it came to be admitted, and so the law continues, that if a man seised of lands in several villages in one county, makes a feoffment of the whole, and gives seisin of parcel of the lands in one town, in the name of all the lands in that town and in the other towns, that all the lands of the feoffor lying in that county shall pass, as well as if there had been livery given in each town.

Co. Lit. 253 a; 2 Ro. Abr. 11.

But, if a man having lands in two counties makes a feoffment of both, and gives livery of the land in one county, in the name of all, the land in the other county shall not pass, because there was no relation or dependence between one county and another, as there was between the several manors and county court; for one county having no power or jurisdiction over another, the *pares* of one were reasonably presumed to be ignorant of what was transacted in the other: and therefore the investiture, which passed the land in one county, was ineffectual to carry the lands in the other, because that investiture could be only a notoriety to the *pares* of the county where it was made; and, consequently, there having been no notice given to the *pares* of the other county by any solemnity of the transferring of the possession, the possession must reside where it was placed by the last investiture.

Perk. 227; 2 Ro. Abr. 11.

But, if a manor extend into two counties, and the feoffment be made of the whole manor, and livery only in the part lying in one county, in the name of the whole manor, yet the whole manor shall pass; because the investiture is a notoriety equally to all the *pares* of that manor of the transmutation of the possession; and though they live in different counties, yet they reside *in eodem territorio ab eodem feudum habentes*; and therefore are presumed to be conusant of every thing done within the territory or manor to which they belong.

Perk. § 227.

But, if the manor of Dale extend into the counties of D and S, and a feoffment be made of the manor of Dale, in D, and livery and seisin in D, nothing passes by this livery but that part of the manor which lies in D, because the feoffment being confined to the manor of Dale in D, nothing can pass that does not lie in the county of D.

Perk. § 228.

If a feoffment be made to A and B by deed, and livery be made to A, in the absence of B, in the name of both, the livery is good to pass the estate to both. But, if the feoffment had been made without deed, and the livery given to one, in the name of both, it should operate to him only. For *the parties are united in a deed*, they all take as one; therefore livery to one, in the name of the rest, is an actual delivery to them all. But *without deed they are not so united*; and therefore the delivery to one, in the name of several, is no actual delivery to the rest, but the whole estate must reside in him to whom it is delivered, and a subsequent assent cannot take it out of him, such assent being not so solemn as the feoffment. Besides, in the case of the feoffment by deed, A may be looked upon as the attorney of B to receive livery; and therefore the estate shall immediately vest in D, because every man is presumed to assent to a grant for his advantage; but the feoffment without deed will admit of no such construction, because no man can receive livery as attorney to another, without an appointment by deed.

Co. Lit. 49, 359; 2 Vent. 202, 205; 5 Co. 95; 2 Ro. Abr. 9; 2 Leon. 23, Mutton's case.

(C) Of the Charter of Feoffment: and herein, what Things are necessary to the making of a perfect Charter, and how far the Charter governs the Livery which is relative to it.

THE things which are essentially necessary to the making of a perfect charter, are but sealing and delivery; for if a man gives land to another and his heirs, and seals and delivers the deed, and gives livery, it is a good charter, and the inheritance shall pass as well as if it had all the formal parts which are generally used in deeds of conveyance.

2 Ro. Abr. 21; Co. Lit. 7.  $\beta$  The delivery of a deed is essential to give it validity, it consists in parting with its possession by the grantor to the grantee, or their respective agents, in such a manner that it cannot be recalled. Kirk v. Turner, Dev. Eq. 14. What will amount to a delivery has been discussed in the following cases: Barlow v. Hinton, 1 A. K. Marsh. 98; Southard v. Steele, 3 Munr. 438; Keirsted v. Avery, 4 Paige, 9; Breckenridges v. Todd, 3 Munr. 54; Souverbye v. Arden, 1 Johns. Ch. R. 240; Verplanck v. Sterry, 12 Johns. 536; James v. Vanderheyden, 1 Paige, 385; Frost v. Beekman, 1 Johns. Ch. R. 240; Methodist Episcopal Church v. Jaques, 1 Johns. Ch. R. 450; S. C. 17 Johns. 548; Roanes v. Archer, 4 Leigh, 550; 2 Day, 280; Beers v. Broome, 4 Conn. 247; Reading v. Weston, 7 Conn. 143; Hale v. Hills, 8 Conn. 39; Jones v. Jones, 6 Conn. 111. A deed not delivered and accepted passes no estate, though it may have been recorded. Doe ex dem. Herbert v. Herbert, 1 Breese, 281; Harrison v. Trustees of Phillip's Academy, 12 Mass. 456. *g*

$\beta$  If a blank piece of paper be signed, sealed, and delivered, and afterward an instrument be written over the signature, it is no deed, as there was nothing of substance in it. But a deed executed with blanks, and afterwards filled up and delivered by the agent of the party is good. (a) The blanks must not, however, be filled up after the acknowledgment. (b)

(a) Duncan v. Hodges, 4 McCord, 239. (b) 4 Binn. 1. *g*

But since, by the statute of frauds and perjuries, the charter of feoffment is made equally necessary with the livery and seisin, to pass the freehold or inheritance, it being thereby (c) enacted, "That all leases, estates, interests of freehold in any lands, tenements, or hereditaments, made or created by livery and seisin only, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect;" for this reason it may be necessary to consider the formal parts of the charter which are generally used in this sort of conveyance at this day.

(c) By 29 Car. 2, c. 3.

These are, 1. The premises; 2. The *habendum*; 3. The *tenendum*; 4. The (d) *reddendum*; 5. The clause of (e) warranty; 6. (g) The *cujus rei testimonium*, comprehending the sealing; 7. The date; And lastly, The *his testibus*.

(d) But for this vide tit. Rents. (e) Vide tit. Warranty. (g) And note, that if the deed be sealed, though it wants the words *in cuius rei testimonium sigillum meum appositum*, yet it is good enough; for the seal appearing, it must be presumed to be set there by the parties to the deed. 2 Co. 5; Leon. 25; Owen, 23; Bendl. 1.

§ 1. Of the premises of the deed; and their office is to name the grantor and grantee, and the thing to be granted or conveyed: Of this two things are observable as regularly true: 1. That no person not named in the premises of the deed, can take any thing by the deed, though he be afterwards named in the *habendum*, because it is the premises of the deed that make the gift; and therefore, when the lands are given to one in the premises, the *habendum* cannot give any share of them to another, because that



## (C) Of the Charter of Feoffment.

would be to retract the gift already made, and, consequently, to make a deed contrary and repugnant in itself. Thus, for instance, if a charter of feoffment be made between A of the one part, and B and C of the other part, and A gives lands to B, *habendum* to B and C and their heirs; C takes nothing by the *habendum*, because all the lands were given to B, and consequently C cannot hold these lands which are given before to another. But in this, if the *habendum* had been to B and C and their heirs, to the use of B and C, this had been a good limitation of a use, and, consequently, the statute would carry the possession to the use, and B and C thereby become jointenants.

Co. Lit. 6 a; 9 Co. 49 b; Hob. 275, 313; 2 Ro. Abr. 65; Cro. Ja. 564; Cro. Eliz. 58.  $\beta$  The subject-matter of the deed is to be ascertained from the premises. Manning v. Smith, 6 Conn. 289. See Doe d. Darden v. Maden, 4 B. & Adol. 880; 1 Nev. & M. 533; 13 Co. 53; Poph. 126.  $\beta$  The technical meaning of the word premises in a deed, is every thing which precedes the *habendum*. Sumner v. Williams, 8 Mass. 174.  $g$

So, if a deed of feoffment be made, without naming any feoffee in the premises, *habendum* to B and his heirs, it seems doubtful whether B shall take any thing by this gift, for though there be not that repugnancy in this case as in the former, the lands being given to nobody in the premises of the deed, and, consequently, the *habendum* cannot be said to be contrary to the premises, but rather explanatory in describing who shall hold the lands which were given in the premises; for which reason, it seems, that my Lord Coke (*a*) holds, that the gift to B is good; yet by the opinion of (*b*) others the gift is void, because the *habendum* can only limit the duration of the estate, but no man can by virtue thereof hold lands which were not given to him.

$\beta$  The *habendum* may lessen, enlarge, explain, or qualify, but must not contradict or be repugnant to the premises. Wager v. Wager, 1 S. & R. 375, 380; Moss v. Shildon, 3 Watts & S. 160; Martin's N. C. R. 28; 5 Barnw. & Cr. 709; 7 Greenl. 455; 6 Conn. 289; 6 H. & J. 132; 3 Wend. 99.  $g$  (*a*) In Co. Lit. 7 a. (*b*) Cro. Eliz. 903, 917; 2 Ro. Abr. 66, 67; 3 Leon. 33.  $\parallel$  The cases in Ro. Abr. and 3 Leon. are certainly *contra*. That in Cr. El. seems *contra* on the first reading; though, on examination, the question appears to have been rather on the manner of pleading the deed, than on the operation of it. But in Car. Rep. 123, there is a case of 21 and 22 El. in which the two chief justices and the chief baron certified to the chancellor, that a lease was good in law, though the lessee was named in the *habendum* only; and a case in Allen, 41, is also with Lord Coke. Hargr. Co. Lit. 7 a, n. 3.  $\parallel$

If lands be given to a husband, *habendum* to him and his wife, and to the heirs of their two bodies, the wife takes nothing, because she was not mentioned in the premises; and therefore shall take nothing of that which was before given entirely to her husband.

2 Ro. Abr. 67.

But there are these four exceptions from this rule: 1. That if lands be given in frankmarriage, the woman that is the cause of the gift may take by the *habendum*, though she be not named in the premises; as, if lands be given to J S, *habendum in liberum maritagium una cum* the woman who is daughter of the donor; this is a good estate in frankmarriage to them both; because the gift being totally on her account, it is necessary to the creation of the estate in the husband that the wife should take.

Co. Lit. 21; Plow. 158; Cro. Ja. 454; Poph. 126; 2 Ro. Abr. 67.

2. In grants by copy of court-roll, as if a copyholder surrenders to his lord, without limiting any use, and then the lord grants it in this manner; J S *cepit de domino*, *habendum* to the said J S and his wife, and the heirs of their bodies begotten, this is a good estate-tail in the wife; for

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these customary grants, that are made in pursuance of a former surrender, are construed according to the intention of the parties, (c) as wills are. Besides that, the custom of the manor is the rule for the exposition of such sort of grants, and in many manors such sort of form is usual.

Brook's case, Poph. 125, 126; Cro. Ja. 434, S. C.; 2 Ro. Abr. 67, S. C.; Downs v. Hopkins, Cr. El. 323. || (c) See Fisher v. Wigg, 1 P. Wms. 15, and 1 Ld. Raym. 622.||

3. That a man not named in the premises may take an estate in remainder by limitation in the *habendum*.

2 Ro. Abr. 68; Hob. 313; Cro. Ja. 564.

4. In wills; for if a man devises lands to J S, *habendum* to him and his wife, this is a good devise to the wife: because, in construction of wills, the intention of the devisor is chiefly regarded; and wherever that discovers itself, it shall take place, though it be not expressed in those legal forms that are required in conveyances executed in a man's lifetime.

Plow. 158, 414; 2 Ro. Abr. 68.

§ 2. Of the *habendum*; and the office of this is to limit the certainty and extent of the estate to the feoffee or grantee, for the *habendum* need not repeat the thing granted; it is sufficient if it be named in the premises, because it is the premises that make the gift, and the word *habendum* does of its own nature refer to things mentioned in the premises.

2 Ro. Abr. 65; 2 Co. 55 a; 9 Co. 47.  $\beta$  A deed is valid, though there are no words of conveyance in the premises, the deed merely setting forth the consideration received by the grantee, the description of the land conveyed, then following the *habendum*, covenants, &c. Bridge v. Wellington, 1 Mass. 219. But when the *habendum* of a deed is inconsistent with the premises, that they cannot stand together, the *habendum* is void; and if the premises pass any thing the grantee will hold. Where, for example, a father gave a slave to his daughter, by a deed of gift, "to hold, &c., after his death;" it was held that the property vested absolutely in the daughter upon the delivery of the deed. Ingram v. Porter, 4 M'Cord, 198.g

Of the *habendum* there are these things observable: 1. That the *habendum* cannot pass any thing that is not expressly mentioned or contained by implication in the premises of the deed; because the premises being part of the deed by which the thing is granted, and, consequently, that makes the gift: it follows that the *habendum*, which only limits the certainty and extent of the estate in the thing given, cannot increase or multiply the gift, because it were absurd to say, that the grantee should hold a thing which was never given to him.

2 Ro. Abr. 65.  $\beta$  The *habendum*, though it may enlarge the estate granted, can never extend the subject-matter of the grant. Manning v. Smith, 6 Conn. 289; it may, however, enlarge the estate conveyed in the granting part. Miller v. Scofield, 12 Conn. 335.g

Hence it is, that if a man grants a manor, *habendum* together with another manor, or with the advowson of another manor, only the manor granted in the premises shall pass.

2 Ro. Abr. 65.

But, if a private person grants a manor *habendum una cum advocacione*, which belongs to the manor, this is a good conveyance of the advowson, because it was impliedly given by the gift of the manor itself.

2 Ro. Abr. 65.

2. How far the *habendum* may alter or abridge the gift in the premises. And here it is regularly true, that the *habendum*, that is repugnant and contrary to the premises, is void, and shall be rejected; because the rule in the

interpretation of all deeds is, that all grants shall be taken most strongly against the grantor; and therefore he shall not be allowed, by any subsequent part of the deed, to contradict or retract that gift which he made in the premises; as, if a man gives lands to J S and his heirs, *habendum* to him for life, this is a void *habendum*, because repugnant to the premises.

2 Co. 23, Baldwin's case.

But for the better explication of this rule, it will be necessary further to consider it under these exceptions: 1. That if no express estate be given in the premises, as, if a rent be granted generally in the premises to J S, this creates an estate for life in J S, by implication of law; that is, the parties having omitted to determine how long J S shall enjoy the rent, the law construes the grant most strongly against the person that makes it, and therefore gives J S an estate in the rent for his own life. But, if the grantor had by the *habendum* limited the rent to J S for years, or at will, this *habendum* had been good; for the law creates an estate for life in J S only, because there was no express estate given by the grantor. But when, upon the face of the deed it evidently appears that the rent was given but for a determinate number of years, or only at the will of the grantor, there the law will never create an estate against the express provision of the parties, or permit J S to enjoy the rent beyond the period of time positively limited in the deed.

Hob. 170; Co. Lit. 183; 2 Co. 24 a, 55; 2 Ro. Abr. 65, 66; Cro. Eliz. 254; 8 Co. 154.

So the *habendum* may frustrate and control the estate by implication in the premises, though the estate limited by the *habendum* be void itself. Thus, if a deed of feoffment be made, and the lands given generally in the premises, *habendum* to the feoffee and his heirs, after the death of the feoffor, the implied estate for life shall not pass by the premises, because it is evidently the intention of the deed that no estate shall pass till after the death of the feoffor; and the limitation in the *habendum* is void; because the livery cannot pass the freehold *in futuro*, for that would create an uncertainty of the freehold, and strangers would be at a loss against whom to bring their *præcipe*, as is before observed.

Cro. Eliz. 254; Hogg v. Cross, Hob. 171; 2 Ro. Abr. 66; 2 Co. 55; Buckler's case, Moore, pl. 591; Cro. Eliz. 451, 585. Vide Moore, 881, *cont.*

2. If to the perfection of an estate limited in the premises there be a ceremony necessary, which is not requisite to pass the estate in the *habendum*; there, if the ceremony be not performed to carry the estate in the premises, the *habendum* shall stand, though it be repugnant to the premises; as if a man covenants, grants, demises, and to farm lets land to A and B, and the heirs of B, *habendum* to A and B for three hundred years, this is but a term for years in A and B, though there be words of inheritance; for it was plainly the intention of the lessor to create a term only by his using the common words of demise. Besides, it is evident that the lessees by the premises could have but an estate at will, because the words of inheritance in the premises were not sufficient to carry the freehold without livery, which was not made in this case, and, consequently, the *habendum* does not really contradict, but enlarge the gift in the premises. It is true my Lord Coke says, at the end of this case, that if livery had been made, only a term for years should have passed; because that the words of demising and covenants in the deed plainly discover the intention of the parties to create a term. But *qu.* of this, because there are words of inheritance in

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the premises; and therefore a livery pursuant to them ought to be taken most strongly against the grantor.

2 Co. 23, 24; Baldwin's case, And. 223; Owen, 48.

But, though the *habendum* cannot retract the gift in the premises, yet it may construe and explain in what sense the words in the premises shall be taken; for it is upon a view of the whole deed that the intent of the parties must be collected. Therefore, if lands be given to a man and his heirs, *habendum* to him and the heirs of his body, this is but an estate-tail; because the *habendum* only expounds the general word *heir* in the premises, and such exposition is consistent, and does not destroy the operation of the words mentioned in the premises, but only explains in what sense they are to be taken, and what heirs are comprehended.

8 Co. 154 b; Co. Lit. 21 a; Lit. Rep. 345.

A prebendary demised land, of which he was seised in right of the church, to J S and his heirs, *habendum* to him and his heirs for three lives, and it was holden to be a good lease against his successor; because the *habendum* explains in what sense and to what purpose the word *heirs* was used in the premises, viz. to create a special occupancy in the lessee; for if the demise had been only to J S *habendum* for three lives, without inserting the word *heirs*, any stranger, upon the death of J S, might have entered and holden the land as a general occupant, during the lives of the *cestui que vies*; therefore the heirs of the lessee shall enjoy the land, because they are mentioned in the premises; but the *habendum* explains in what manner they shall enjoy it, and that is, as special occupants during the three lives.

Pilsworth v. Pyett, Sir T. Jon. 4; 2 Keb. 865, S. C.

But it has been holden, where a husband was seised of land in right of his wife for her life, and they both by deed of feoffment conveyed the land to J S and his heirs, *habendum* to him and his heirs, to the use of him and his heirs for the life of the wife; that the whole fee-simple passed to J S, and so was a forfeiture of the estate; for there being a fee-simple conveyed to J S by the livery, and the premises and *habendum* of the deed, the words of restriction for the life of the wife refer only to the limitation of the use, and, consequently, the fee-simple remains in the feoffee; whereas, in the former case, the conveyance was wholly at common law; and therefore the restriction in the *habendum* must relate to that or be void, which is never admitted where the words are only explanatory and not repugnant.

Cro. Eliz. 131, Piers v. Hoe.

So of a rent; as, if the grant had been to J S and his heirs, executors, and assigns, *habendum* to him and his heirs, executors, and assigns, for or during the life of J N, this is a good *habendum*, and the lessee has only an estate for life; for the *habendum* does not defeat, but explain the operation and the use of the word *heirs* in the premises; for as this case stands, upon the death of J S, his heirs shall enjoy the rent during the life of J N, as special occupants; whereas, if the rent had been granted only to J S for the life of J N, it would have determined upon the death of J S, because there can be no general occupant of a rent; and the heirs of J S could not take, because not named in the grant.

Moore, 876; 2 Ro. Abr. 66; Wilkins and Perrot; Brownl. 169; Buls. 135.

If the grant had been to him and his heirs, *habendum* to him for his life,

and the lives of three others ; this is likewise a good *habendum* ; because it does not render the word *heirs* in the premises useless, but expounds them only to create a special occupancy, and thereby to prevent the determination of the estate by the death of the grantee.

Bowles v. Poor, 1 Bulstr. 135 ; Cro. Ja. 282, S. C.

But, if the grant in the premises be of a rent to a man and his heirs, *habendum* for the life of the grantee, this is a void *habendum*, because it totally defeats the operation of the word *heirs* in the premises, and, consequently, is repugnant and not explanatory, and therefore void.

2 Co. 23, 24.

If a man makes a feoffment in fee in 20 acres to A and B, *habendum* one moiety to A, and the other moiety to B, this is good, and the *habendum* makes them tenants in common ; for though the premises be joint, and therefore of themselves would operate to give a joint estate and possession, yet the *habendum* explaining the manner of possessing is not inconsistent or repugnant, because it makes no division of that undivided possession which was given in the premises.

Co. Lit. 190 b, 183 b, and 180 b, note 1, 13th edit. ; Hob. 172.

But, if the *habendum* had limited ten acres to A, and the other ten acres to B, this had been void, because the *habendum*, in this case, contradicts and is repugnant to the premises ; for by the premises, the entire and undivided possession of the whole twenty acres is equally given to both ; and therefore the *habendum* that excludes A out of his share of ten acres, and B out of his share of ten acres, is contradictory to the premises, and therefore void.

Hob. 172.

If a lease be made to two, *habendum* to one for life, remainder to the other for life ; this is a good *habendum*, because it explains the design of the gift in the premises, and shows that they shall take the whole in succession one after the other.

Co. Lit. 183, 190 ; 2 Co. 55 ; 2 Ro. Abr. 65.

So, a lease to the mother and son, *habendum eis pro termino vitæ eorum et alterius eorum diutiùs vivent., successivè uni eorum post alterum sicut nominantur in charta et non conjunctim* ; here the *habendum* explains in what manner they shall enjoy the land ; nor is the *habendum* void for the uncertainty who shall take first, because they are to take one after another, as they are named in the deed ; and therefore the mother was adjudged to be tenant for life, the remainder to the son.

Dyer, 361 ; Bulstr. 135.

But a demise to A, *habendum* to him, B, and C, *pro termino vitæ eorum et alterius eorum successivè diutiùs vivent.* ; this is a void *habendum*, and neither B nor C can take any thing ; not as lessees in possession, because not parties to the deed, or named in the premises ; nor by way of remainder, because they cannot take jointly in remainder, the limitation being to them *successivè* ; nor can they take in succession one after the other, because *non constat* by the deed who shall take first in remainder.

Hob. 313, Windsmore v. Hobert.

A made a lease to B, C, and D, for their lives, *proviso*, and it is covenanted and granted, that C shall not enjoy the land during the life of B, and that D should not enjoy the land during the life of C, this is but a col-

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lateral covenant, which shall not alter the nature of the estate given by the premises which create the gift.

Cro. Eliz. 89, 107; Moore, 267; Leon. 217.

A made a lease for three lives, and after grants the reversion to J S, *habendum* to him for life, such estate for life to begin after the death of the three first lessees; this is a good grant of the reversion to J S during his life to commence immediately; for though the *habendum*, as is already observed, may totally control any implication in the premises, and defeat the estate therein given by implication of law, yet in this case there was an express estate given for the life of the grantee, and no subsequent words shall defeat that estate which was complete and express by the former part of the deed; and therefore the subsequent words, which would limit the estate to commence *in futuro*, are void; because a freehold cannot be granted *in futuro* for the reasons already observed.

Underwood & Underhayse's case, 2 R. Abr. 66, pl. 4; Hob. 271, S. C.; Moore, 881, S. C. & Cro. El. 269, S. C. ill reported. || If a man grants a reversion, *habendum* after the death of the tenant for life, it is good; for it is but a limitation when he shall have the possession. But, if it be *habendum* after the death of a stranger, it will be otherwise. Buckler v. Hardy, Cro. Eliz. 585.||

A termor for years, reciting by indenture his term and his lease, grants all his term, estate, and interest to another, *habendum sibi et assignatis suis immediate post mortem* of the grantor; this was holden a void *habendum*, because, by the grant in the premises the whole interest was absolutely conveyed; and therefore the *habendum*, that retracts the grant, is void; for it may happen that the grantor may outlive the term, and then the *habendum* defeats and is repugnant to the grant.

Lilly v. Whitney, Dyer, 272; 2 Ro. Abr. 66, S. C.; Hob. 171; Cro. Eliz. 255. So Jerman v. Orchard, 1 Salk. 346; 12 Mod. 11, S. C.; Freem. 500, S. C.; Skin. 528, S. C.; Show. P. C. 199, S. C.

A makes a lease for three lives of lands, and afterwards demises to J S for ten years the reversion of the lands, *habendum* the said land from Michaelmas next ensuing after the death of the lessee for lives; this is a good demise to J S, because the word *reversion*, including not only the interest or estate which A had depending upon the estate for lives, but likewise the land itself, returning after the determination of the particular estate, the *habendum*, which explains in what sense the word *reversion* is to be taken, shall stand; and therefore in this case J S was adjudged to have a term for years in the land, to commence upon the determination of the freehold.

Plow. 147, 148, 160; Throgmorton v. Tracy.

§ 3. The next formal part of the deed is the *tenendum*, and this, since the statute of *quia emptores terrarum*, must be to hold of the chief lord in fee, if a fee simple be conveyed; but, if an estate tail be conveyed, it may be to hold of the donor.

See Perk. § 633, &c.

[It is now of very little use, being only inserted by custom; it was formerly used to signify the tenure by which the estate granted was to be holden, viz., *tenendum per servitium militare*, in *burgagio*, in *libero soccagio*, &c.; but all these being reduced by statute 12 Car. 2, c. 24, into free and common socage, the tenure is now never specified.

§ 4. Next follows the *reddendum*, which is that by which the grantor doth create or reserve some *new* thing to himself out of what he had before granted.

See tit. *Rent.*.

§5. The clause of warranty. A warranty is a covenant real, annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same lands, and to render in value, if they are evicted by a former title.

See tit. *Warranty*. β See *Bender v. Fromberger*, 4 Dall. 411; *Phillips v. Bonsall*, 2 Binn. 138; *Paul v. Whitman*, 3 Watts & S. 407. The law implies a warranty of title in the sale of goods, but not in the sale of land. *Dorsey v. Jackman*, 1 S. & R. 42.g

§6. Of the *cujus rei testimonium*, comprehending the sealing. This clause is not necessary, though sealing be of the essence of a deed, for if a writing be not sealed, it is not a deed.

Co. Lit. 6 a, 7 a; 2 Co. 5 a; 1 Leon. 25. β A conveyance of a freehold estate not made by writing under seal, is invalid. *Jackson v. Wood*, 12 Johns. 73.g

β It seems that the words at the end of a deed, following the "*In cujus rei testimonium*," &c., form no part of the deed.

*Pearce v. Morrice*, 4 Nev. & M. 48; 2 Ad. & Ell. 84.g

The practice of sealing came into this country with the Normans. Some indeed, among whom is Sir Edward Coke, have supposed that it obtained in some degree in the time of the Saxons, a mistake which hath proceeded from not knowing that the crosses (with which both principals and witnesses then signed) were indifferently called *signa* and *sigilla*. This mode of authenticating instruments soon became of general use; though it is certain that there were several conveyances, which, down as low as the reign of Edw. the 3d, were admitted as good and legal, when otherwise well attested, although they never had any seals affixed to them. These were the grants of those who still adhered to the old Saxon mode, and retained the subscription of names and crosses. And mankind might, perhaps, safely rely upon the authority of seals, while signets were carefully preserved, and the arms or impressions were appropriated; but as population increased, and the same arms were indiscriminately used by numbers, the evidence of seals only must necessarily become uncertain and unsatisfactory; the statute of 29 Car. 2, c. 3, revives, therefore, the old Saxon custom; and expressly directs the signing, in all grants of lands, and many other species of deeds. It hath indeed been formerly holden, that sealing is a signing within the statute, a doctrine which would have disappointed the intent of the legislature, and which the better judgment of later times hath exploded.

Speln. Glossar. voc. *Sigillum et signum*; Co. Lit. 70 a; Nichols. English Histor. Libr. 242. β Merlin defines a seal to be a plate of metal with a flat surface, on which is engraved the arms of a prince, or nation, or private individual, or other device with which an impression may be made on wax or other substance, on paper or parchment, in order to authenticate them: the impression thus made is also called a seal. Merl. Rep., mot *Seau*. Lord Coke defines a seal to be wax with an impression. 3 Inst. 169. "Sigillum," says he, "est cera impressa, quia cera sine impressione non est sigillum." This is the common law definition of a seal, Perk. 129, 134; Bro. *Faits*, 17, 30; 2 Leon. 21; 5 Johns. 239; 2 Caines, 362; 3 M'Cord, 583; 21 Pick. 417. This definition appears not to be correct, at least in modern times; a seal impressed on the paper alone, without wax, wafer, or any other substance, as in the case of writs is undoubtedly good; and wax or a wafer placed for a seal, without any impression, are also good, unless otherwise required by special laws. 4 Blackf. 185. But in Pennsylvania, New Jersey, and the southern and western states generally, a written, circular, oval or square mark, made with a pen, opposite the name of the signer has the effect of a seal, the shape, however, is indifferent. *M'Dill v. M'Dill*, 1 Dall. 63; *Long v. Ramsay*, 1 S. & R. 72; *Taylor v. Glaser*, 2 S. & R. 504; *Duncan v. Duncan*, 1 Watts, 322; 2 Halst. 272; 15 Wend. 256; 5 Whart. 563.g 3 Lev.; 2 Str. 764.

§7. Of the date.—The date is not essential to a deed; for if it hath no

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date, or a false or impossible date, the deed shall be good, and shall take effect from the time of delivery.

Co. Lit. 6 a, 2; Co. 5 a; 3 Leon. 100.  $\beta$  Deeds take effect from the delivery, and not from the date, whenever the rights of third persons are involved. Hood v. Brown, 2 Ohio, 185. Where a deed had two dates, one at the top and another at the bottom, the first being a year before the last: the last taken in connection with the acknowledgment was holden to be the true date. Morrison v. Caldwell, 5 Munr. 433.*g*

So, if it hath the day of the month, but no year is mentioned, for that is a void date: and in such case it may be pleaded to have been delivered at some other day than that mentioned in it.

2 Ro. Abr. 27; Yelv. 194.  $\beta$  When a deed is admitted to be antedated, the proof of the time of its execution must be made by the party claiming under it. Geiss v. Odenheimer, 4 Yeates, 278.*g*

If two deeds bear date the same day, and are evidently but one agreement, that shall be presumed to be executed first, which will support the clear intent of the parties.

1 Burr. 60.

§ 8. Lastly, the *his testibus*. The attestation or execution of a deed in the presence of witnesses is necessary, rather for preserving the evidence, than for constituting the essence of the deed. This clause of *his testibus* was formerly introduced as well in the king's grants as in the deeds of subjects; in the former, however, it hath been long discontinued, the king attesting his patent himself; and it was entirely disused in the latter in the reign of Henry 8, since which time the witnesses have subscribed their attestation either at the bottom, or on the back of the deed.

2 Inst. 77, 78; 2 Bl. Com. 307.]  $\beta$  In Pennsylvania, the signing of a deed is now the material part of the execution, and it is good without subscribing witnesses. McDill v. McDill, 1 Dall. 63; Long v. Ramsay, 1 S. & R. 72. In Ohio, two witnesses are indispensable. Clarke v. Graham, 6 Wheat. 577. See Merwin v. Camp, 3 Conn. 35; Smith v. Chapman, 4 Conn. 344; Carter v. Champion, 8 Conn. 549.*g*

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If a person *non compos* makes a feoffment, and gives livery himself, this is allowed on all hands to be good to bind himself, so that he can by no process or plea avoid the feoffment, and restore himself to the possession. The same law of an idiot. And the reason is, because the investiture being made before the *pares curiæ*, their solemn attestation could not be defeated by the person himself, it being presumed they were competent judges of the ability of the feoffor to make such feoffment.

2 Ro. Abr. 2; Co. Lit. 247; 4 Co. 125 a; Show. Parl. Cases, 153, and vide tit. *Idiots and Lunatics*.

But, if an infant makes a feoffment, and makes livery himself, this shall not bind him; but he himself may avoid it by writ of *dum fuit infra ætatem*; yet the feoffment of the infant is not void in itself, as well because he is allowed to contract for his benefit, as that there ought to be some act of notoriety to restore the possession to him, equal to that which transferred it from him.

4 Co. 125; 2 Ro. Abr. 2; 8 Co. 42, 43, Whittingham's case.

But, if an infant makes a feoffment, and a letter of attorney to make livery, that is void. So, if a person *non compos* makes a surrender or lease, this is void in law. So, if he makes a letter of attorney to give livery. But the heir at law after the death of the person *non sane* of memory, or idiot, may



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avoid his feoffment; and so may the king upon an office found of his lunacy during his life.

8 Co. 45; Co. Lit. 247 a; 4 Co. 125 a; 2 Ro. Abr. 2; Show. Parl. Cases, 153.

As the infant's feoffment is voidable *dum fuit infra ætatem*, when he comes of full age, so it is voidable by him by entry during his nonage; but his letter of attorney is merely void. And the same law seems to be of a feme covert; for if she makes a feoffment upon the land, it is voidable by her husband; but, if she makes a letter of attorney to give livery, it is absolutely void in law. And the reason is, because the contracts of those that are disabled by law to contract were void contracts; but their infeudations were not in themselves void, because they were made *coram paribus curiæ*, who were presumed not to attest contracts of persons disabled by the law to contract, especially since such contracts were made for military or socage service, which were for the good of the commonwealth; and by those infeudations a stranger was directed to bring his *præcipe* against the person that was actually invested in the land; wherefore the infant's feoffment was good till it was avoided by an act of equal notority, to wit, by his entry *coram paribus*, which was equally solemn with the act of feoffment, or by bringing his *action at full age*, when the law had enabled him, by action in a court of record, to set aside the feoffment that he had made during minority. But the law enabled him by entry to set aside the acts *coram paribus* during minority, because the *pares* might undo what was done *in pais*; and the courts of justice were not to destroy the acts *in pais* till the infant, by his own discretion, had chosen to avoid them, because it was derogatory to the dignity of the courts of justice to set aside the solemn acts *in pais*, till the infant had come to such age of discretion as might make it fully appear that the feoffment was made during his disability. For the infant was not received to disable himself during the time of his disability; but during such disability he might, by equal solemnity *in pais*, disable himself, since such an act was only *coram paribus*, in the same manner as the feoffment itself was made, but the warrant of attorney of the infant was *ipso facto* void; and therefore such feoffee was a disseisor, as if no authority had been committed to the attorney to make the feoffment. But in the case of the *non compos* he was not admitted to stultify himself, because there was no stated time when such persons returned to sense and understanding, and therefore they could not be presumed to be conscious themselves of their own follies or defects. But the king, who had the care of all his subjects, might, by solemn office found, avoid such acts of insanity, and so might the heir at law after their death.

4 Co. 125; 2 Ro. Abr. 2; 8 Co. 42, 43, 45; Cro. Ja. 617; Gardiner v. Norman, Perk. 2183. See 2 Bl. Comm. 291, 292; F. N. B. 202, D.

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A MAN may either give or receive livery by his attorney; for since a contract is no more than the consent of a man's mind to a thing, where that consent or concurrence appears, it were most unreasonable to oblige each person to be present at the execution of the contract, since it may as well be formed by any other person delegated for that purpose by the parties to the contract.

Co. Lit. 52; 2 Ro. Abr. 8. *β*As to the form to be observed in the execution of the authority, it is a general rule that an act done under a power of attorney must be done in the name of the person who gives the power. 9 Co. 76, 77; it has been holden

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that the name of the attorney is indispensable. 1 W. & S. 328 But it matters not in what words this is done, if it sufficiently appear to be in the name of the principal, as, for A B, (the principal,) C D, (the attorney;) which has been holden to be sufficient. *Jones' Devises v. Carter*, 4 Munf. 421; 15 S. & R. 55; 7 Watts, 121; 6 Joins. 94. See Bouv. L. D. *Authority*; *Fowler v. Theasor*, 7 Mass. 14. But where an agent granted in this form, "I, A B, agent of the Middletown Manufacturing Company, for," &c., "do give, grant," &c., it was held that his grant was valid. *Magill v. Hinsdale*, 6 Conn. 464.

But such delegation or authority to give or receive livery must be by deed, that it may appear to the court, that the attorney had a commission to represent the parties that are to give or take livery, and whether the authority was pursued.

Co. Lit. 48 b, 52 a; 2 Ro. Abr. 8; *Palfreman v. Grobie*.

For if the letter of attorney be to make livery upon condition, as to make a feoffment conditional, and the attorney deliver seisin absolutely, the livery is not good, because the attorney had no authority to create an absolute fee-simple; and therefore such absolute feoffment shall not bind the feoffor, because he gave no such authority; and hence in some books the attorney is called a disseisor.

11 H. 4, 3; 2 Ro. Abr. 90; Co. Lit. 258; Perk. § 188.

But, if the letter of attorney had been to make livery absolutely, and the attorney had made it upon condition, this seems a good execution of his power, and the feoffment good; because when the attorney had once delivered possession, he fully executed his power; and the condition annexed to it, being without authority, is void; and therefore shall not destroy the operation of the livery.

26 Ass. 39; 2 Ro. Abr. 8; Co. Lit. 258; Perk. § 192.

If a warrant of attorney be given to make livery to one, and the attorney make livery to two; or if the attorney had authority to make livery of Black-acre, and he made livery of Black-acre and White-acre; though the attorney has in these cases done more, yet there is no reason that should vitiate what he has done pursuant to his power, since what he did beyond it is a perfect nullity, and void.

Perk. § 189.

But, if the attorney were to deliver seisin to two, and he had made livery only to one, that had been void, because he had no authority to deliver the whole possession to one exclusive of the other, and therefore it is void for the whole.

Perk. § 188.

An attorney cannot make livery within view, because such livery is made by signs or words, instead of the act of delivery. Besides, the power of the attorney is to deliver the possession, but that power is not executed by the livery in view, because the possession is not in the feoffee till actual entry made by him, and, consequently, the attorney has not executed his authority.

Co. Lit. 52; 2 Ro. Abr. 9.

If a letter of attorney be given to two jointly to take livery, and the feoffor make livery to one in the absence of the other, in the name of both, this is void: because they being appointed jointly to receive livery, are considered but as one.

Co. Lit. 49; 2 Co. Abr. 8.

But, if a *feoffment be made* to A and B, and the feoffor give a letter of

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attorney to deliver seisin, and J S give livery to A, in the absence of B, in the name of both, this is a good livery ; for though the entire possession be delivered to one only, yet they being jointenants by the deed of feoffment, such delivery to one makes no alteration or change in the possession, because, if the livery had been made to both, each had been placed in the possession. Besides that, every man being presumed to accept a gift for his advantage, A is looked upon as the attorney of B to receive the possession for him ; and therefore the livery to A enures to the benefit of B till he disagrees to it.

Co. Lit. 49 ; 2 Ro. Abr. 8.

But, if a letter of attorney be made to three *conjunctim et divisim*, and two only make livery, this is not good, because not pursuant to their authority, for the delegation was to them all three, or to each of them separately ; yet if the third person was present at the time of the livery made by two, though he did not actually join with them in the act of livery, yet the livery is good ; because when they all three are upon the land for that purpose, and two make livery in the presence of the third, there is his concurrence to the act, though he did not join in it actually, since he did not dissent from it.

Dyer, 62 ; Ro. Abr. 326. See Co. Lit. 52 b, n. 2, 13th edit. *β* See vide Roll. Ab. 329 l. 5 ; Com. Dig. *Attorney*, c. 8 ; 2 Pick. 345 ; 3 Pick. 232 ; 6 Pick. 198 ; 12 Mass. 185 ; 6 Johns. 39. But when the authority is of a public nature, it may be executed by a majority. 9 Watts, 466 ; Bouv. L. D. *Authority.g*

If a letter of attorney be given to A to make livery of lands already in lease, the attorney may enter upon the lessee in order to make livery ; because, while the lessee continues in possession, the attorney cannot deliver seisin of it ; and therefore to execute the power given him by the letter of attorney, it is necessary he should have a power to enter upon the lessee. But by Rolle, it is the safer way to insert a clause in the letter of attorney, for the attorney to enter *et omnes alios inde expellend*.

Co. Lit. 52 b ; Poph. 103 ; Dyer, 131 a, 340 a ; 2 Ro. Abr. 9.

If A be disseised of Black-acre and White-acre, and give a letter of attorney to enter into both, and make livery, if the attorney enter into one acre only, and make livery *secundum formam chartæ*, this is not good, because the attorney has not pursued his authority ; for the estate of the disseisor cannot be defeated without an entry into both acres ; and till the estate be defeated, the attorney cannot execute his power in the manner it was delegated ; and therefore what he did in this case was void.

Co. Lit. 52 a ; 2 Ro. Abr. 9.

This power of the attorney must be executed during the life of the person that gives it, because the letter of attorney is to constitute the attorney my representative for such a purpose, and therefore can continue in force only during the life of me, that am to be represented. And hence it is, that if J S take a letter of attorney to deliver seisin after my death, it is void ; because he cannot deliver seisin during my life, for that were plainly without any authority from me ; nor can he do it after my death for the former reason.

2 Ro. Abr. 9 ; Co. Lit. 52 ; Perk. § 188.

This authority to give livery may be delegated by deed indented, though the attorney be not party to the deed, because the attorney takes

(E) Of making it by Letter of Attorney.

nothing by the deed, but has only a naked authority delegated to him ; and therefore, since a man may take an estate in remainder, though he is not party to the deed, *a fortiori* one not party to the deed may receive a naked authority or power by it.

2 Ro. Abr. 8, 9, and vide Co. Lit. 52.

But, if any corporation aggregate, as a mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean ; but the attorney may well execute the power after their death, because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean, and therefore may be represented by their attorney. But, if the dean or mayor be named by their own private names, and die before livery, or be removed, livery after seems not good.

11 H. 7, 19 ; 14 H. 8, 3 ; Co. Lit. 52 b ; 2 Ro. Abr. 12.

There are few or no persons excluded from exercising this power of delivering seisin, for monks, infants, femmes covert, persons attainted, outlawed, excommunicated, villeins, aliens, &c., may be attorneys ; for this being only a *naked authority*, the execution of it can be attended with no manner of prejudice to the persons under these incapacities or disabilities, or to any other person, who by law may claim any interest of such disabled persons after their death.

Co. Lit. 52 ; Perk. § 187.

A feme covert may be an attorney to deliver seisin to her husband, and so may he in remainder be an attorney to make livery to the tenant for life.

Co. Lit. 52 a ; Perk. § 198. So a husband may be attorney for his wife. Co. Lit. 52 a.

If lessee for life make a deed of feoffment and letter of attorney to his lessor to deliver seisin, if the lessor make livery accordingly, it is a good feoffment ; but the lessor, notwithstanding he gave livery himself, may enter for the forfeiture of the tenant for life ; because the freehold being in the tenant for life, the lessor was only his representative to transfer it. But, if the tenant had been only lessee for years, and the lessor had made livery, that had been no forfeiture of the term ; because, the freehold being only in the lessor, he could not be the representative of the termor to convey what the termor had not ; and therefore the freehold, which passed by the livery, must proceed from the lessor himself, and, consequently, shall bind him.

Co. Lit. 52 ; Perk. § 200.

If A makes a lease for years to B, and after makes a deed of feoffment with a letter of attorney to B to deliver seisin, and B makes livery accordingly, this shall not extinguish or affect his term, because the livery was made to pass the freehold, and that he did as representative to the lessor ; and therefore, since the feoffee can claim nothing from the lessee, the interest of the lessee remains as it was, unaffected by the feoffment.

Co. Lit. 52.

## FINES AND AMERCEMENTS.

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It seems that originally all punishments were corporal; but that after the use of money, when the profits of the courts arose from the money paid out of civil causes, and the fines and confiscations in criminal ones, the commutation of punishments was allowed of, and the corporal punishment, which was only *in terrorem*, changed into the pecuniary, whereby the courts found their own advantage.

This begot the distinction between the greater and less offences; for in the *crimina majora* there was at least a fine to the king, which was levied by a *capiatur*; but upon the less offences there was only an amercement, which was affeered, and for which a *distringas* or action of debt only lay.

But for the better understanding hereof we shall consider :

- (A) Who have sufficient Authority to fine and amerce.
- (B) For what Offences the party is to be fined or amerced.
- (C) In what Actions or Proceedings there ought to be a Fine or Amercement: And herein,
  1. *Of the Nature of the Action, in which there ought to be a Fine or Amercement.*
  2. *At what Time to be awarded.*
  3. *Whether to be awarded when the Party is acquitted as to Part.*
  4. *Whether to be awarded where there are several Parties, and some of them only acquitted.*
  5. *Of awarding Fines and Amercements jointly or severally.*
  6. *Whether the Party can be twice amerced in the same Action.*
- (D) Where a Fine ought to be awarded, and not an Amercement, and *vice versa*.
- (E) Who, in respect of their Persons, are not to be fined or amerced.
- (F) Of the Reasonableness of the Fine; and herein of mitigating or aggravating it.
- (G) Of the Reasonableness of an Amercement, and the Affeement thereof: And herein,
  1. *Of the Necessity of an Affeement.*
  2. *By whom the Affeement is to be.*
- (H) Of the Manner of recovering Fines and Amercements.

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(A) Who have sufficient Authority to fine and amerce.

REGULARLY, all courts of (*a*) record may fine and imprison an offender, if the nature of the offence be such as deserves such punishment.

8 Co. 39; Dalt. 400. (*a*) But no court, unless of record, can fine or imprison. 11 Co. 43 b; Godb. 381, S. P. adjudged. That wherever a jurisdiction is erected with power to fine and imprison, that is a court of record. Salk, 200.

Therefore the sheriff in his *torn* may impose a fine on all such as are guilty of any contempt in the face of the court, and may also impose what reasonable fine he shall think fitting upon a suitor refusing to be sworn, or upon a bailiff refusing to make a panel, &c., or upon a tithingman neglecting to make his presentment, or upon one of the jury refusing to present

(B) For what Offences the Party is to be fined, &c.

the articles wherewith they are charged, or upon a person duly chosen constable refusing to be sworn.

2 Inst. 143; 8 Co. 38.

Also, the steward of a court-leet may, by recognisance, bind any person to the peace who shall make an affray in his presence, sitting the court, or may commit him to (a) ward, either for want of sureties, or by way of punishment, without demanding any sureties of him; in which case he may afterwards impose a fine according to his discretion.

F. N. B. 82; Dalt. c. 1; Lamb, c. 3; 10 H. 6, 10 b; Crompt. 7; 2 Hawk. P. C. 4. (a) But in 11 Co. 43, it is said, that some courts may fine, but not imprison; as the leet. Ro. Rep. 74, S. P., by my Lord Coke; and in Ro. Rep. 35, it is said by Coke, that this is the only court that can fine, but not imprison.

Also, the sheriff in his *town*, and the steward of a court-leet, have a discretionary power, either to award a fine or amercement for contempt to the court; as for a suitor's refusing to be sworn, &c.; and the (b) steward of a court-leet may either amerce or fine an offender, upon an indictment for an offence not capital, within his jurisdiction, without any farther\* proceeding or trial; especially if the crime were anyways enormous: as an affray accompanied with wounding.

Keilw. 66; Kitchin, 43, 51. (b) But the statute 1 E. 4, c. 2, restrains the sheriff from levying any fines or amercements on indictments found before them.—\* *Qu. de hoc*.

It is said, that some courts may imprison but not fine: as the constables at the petit sessions.

11 Co. 44; Ro. Rep. 74.

Also, some (c) courts cannot fine or imprison, but amerce; as the county, hundred, &c.

11 Co. 43 b. (c) A was seised of the manor of Gravesend, and prescribed for a water-court within his manor, for reformation of the disorders amongst watermen; and whether this court was not in nature of a leet, and not a court-baron, so that the steward, without any special prescription, might assess a fine, *dubatur*. Leon. 216.

But some (d) courts can neither fine, imprison, nor amerce; as (e) ecclesiastical courts holden before (g) the ordinary, archdeacon, &c., or their commissaries, and such as proceed according to the canon or civil law.

11 Co. 44 a. (d) No English court can fine for not appearing to answer a bill there. Ro. Rep. 336. Nor can the chancellor for breach of a decree. 4 Inst. 84. (e) Their proceedings are only by ecclesiastical censures. 4 Inst. 324. Vide 16 Car. 1, c. 11, § 4; 13 Car. 2, c. 12; Noy, 17. (g) But whether the high commission court (while standing) could fine and imprison, was *revata questio*. Vide Poph. 60; Cro. Car. 582; 4 Inst. 324, &c., 332. By 16 Car. c. 11, § 2, such fines and imprisonment recited to have been used to the oppression of the subject.—That they used to fine and imprison, which was illegal; yet the parties were remanded on a *habeas corpus*. Comb. 306, *per* Holt, C. J.

(B) For what Offences the Party is to be fined or amerced.

EVERY court of record may enjoin the people to keep silence under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court; as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court.

11 H. 6, 12 b; Ro. Abr. 219; 8 Co. 38; 11 Co. 43; Cro. Eliz. 581; Sid. 145.

If any of the jury give their verdict to the court before they are all agreed of their verdict, they may be fined.

40 Ass. 10, for this, vide head of *Juries*.

(B) For what Offences the Party is to be fined, &c.

If time out of mind a constable hath yearly been elected, and presented by the jury at a leet, and J S by them is elected and presented constable, and being (a) in court, and by the steward required to take his oath accordingly, refuses and departs in contempt of the court, the steward may impose a fine on him.

8 Co. 38 b, Griesly's case, v. 93. (a) That the steward may impose a fine upon a person who is elected by the homage, if he is present at the leet, and refuses to be sworn to execute the office. But, if the person is not present the steward cannot fine him, but he may be amerced, which must be presented at the next court, and affirmed. But the party ought to be summoned, and a time and place ought to be appointed under a penalty, when and where he shall come, and before whom to take the oath; and it is not sufficient to allege in general that he had notice, for though he be an inhabitant, yet he may be essoined. 5 Mod. 130, adjudged.

So, if a tithing-man refuse to make a presentment in a leet, the steward may impose a reasonable fine on him.

8 Co. 38 b.

So, if one of the jury in a leet depart without giving his verdict, he shall be fined by the steward.

8 Co. 38 b.

If one is present when a murder is done, and does not his best endeavour to apprehend the murderer, he shall be fined and imprisoned.

3 Inst. 53.

So, if two are fighting, and others looking on, who do not endeavour to part them; if one is killed, the lookers on may be indicted and fined to the king.

Noy, 50.

If at a justice-seat, holden within a forest, a man makes a false claim of privilege, he shall be fined.

4 Inst. 297.

If a dead body in prison, or other place, whereupon an inquest ought to be taken, be interred or suffered to lie so long that it putrefy before the coroner hath viewed it, the jailer or township shall be amerced.

Keb. 278; 2 Hawk. P. C. c. 9, § 23.

If any homicide be committed, or dangerous wound given, whether with or without malice, or even by misadventure, or self-defence, in any (b) town, or in the lanes or fields thereof, in the (c) day-time, and the offender (d) escape, the town shall be amerced; and if out of a town, the hundred shall be amerced.

3 Inst. 53; 4 Inst. 183; Cro. Car. 252; 3 Leon. 207; 2 Inst. 315; Dyer, 210. (b) By the statute 3 E. I, c. 6, no city, borough, or town shall be amerced without reasonable cause, and according to the quantity of the offence; vide Cro. Car. 252: where an information was exhibited against the mayor and commonalty of London, for that J S was killed in a tumult there, and none of the offenders taken, nor any person known or indicted for the felony; upon which they appeared and confessed the offence, and were fined 1500 marks. (c) Where the stroke was given in the day-time, but the party did not die till night, *dubitatur*. Leon. 107; 3 Leon. 207. (d) Of which the coroner may inquire upon view of the body; or the justices of the peace may inquire of such escapes, and certify them into the King's Bench. 4 Inst. and vide 3 H. 7, c. 1.

Also, since the statute of Winchester, 13 E. 1, c. 5, ordains, that walled towns shall be kept shut from sun-setting to sun-rising, if the fact happen in any such town by night or by day, and the offender escape, the town shall be amerced.

3 Inst. 53; 7 Co. 6 b, 7 a.

(C) In what Actions there ought to be a Fine, &c.

If by the forest law, hue and cry is made for a trespass in venison, any township or village within the forest, which does not follow the hue and cry, shall be amerced at the justice-seat.

4 Inst. 294.

If the deciners ought to pay rent at the leet (*a*) *pro certo letæ*, this is not (*b*) properly a rent, but a sum in *gross*; and if they do not pay it, they may be amerced, for this is due and payable at the leet.

13 H. 4, 9; Ro. Abr. 211; Yelv. 186, S. P., a custom being laid. Brown. 190; 6 Co. 77. But, if not warranted by the custom, perhaps it is otherwise. Godfrey's case, 11 Co. 44 b; Ro. Rep. 32, 73. (*a*) For the original thereof, vide 6 Co. 77; 2 Inst. 71. (*b*) But for a rent distrainable, no amercement shall be in a leet. 11 H. 4, 89 b; Ro. Abr. 211.

A man shall not be amerced in (*c*) a leet for trespass to the lord himself, for he shall not be his own judge.

12 H. 4, 8 b; Leon. 242, S. P. *per Gawdy*; Raym. 160; Saund. 135; 2 Keb. 139; 3 Keb. 744, S. P. adjudged; || 3 Burr. 1706, 1707, 1731. Nor will a custom warrant the amercement in such case. Wood v. Lovatt, 6 T. R. 511. || (*c*) But such private trespass may be presented there for the lord's information. Saund. 135; 2 Keb. 139.

If a man arrests another in London, coming to the Common Pleas to answer a writ at the suit of the (*d*) same man, because he ought to have his privilege, the plaintiff shall be fined for the contempt of the court.

9 H. 6, 55; Ro. Abr. 218, S. C.; 8 Co. 60, S. C. cited. (*d*) But, if another man had arrested him, who was not plaintiff in the writ *in banco*, he should not be fined. 9 H. 6, 55.

So, if the plaintiff in a suit *in banco* be arrested at the suit of the defendant in London, (*e*) before the return of the writ *in banco*, this is a contempt to the court; and for this he shall be fined and imprisoned.\*

11 H. 6, 22; Ro. Abr. 218, S. C. (*e*) Where one under countenance of law is guilty of double vexation; as if he sues in B, and, pending this, sues in London for the same cause, he shall be fined. 8 Co. 60 a; Gouls. 30, pl. 5.—\* *Sed quæ*. If this is now law? as the defendant may have just cause of action against the plaintiff notwithstanding the prior suit pending.

|| A court of general jail delivery has the power to make an order to prohibit the publication of the proceedings pending a trial likely to continue several successive days, and to punish disobedience to such order by fine.

Rex v. Clement, 4 Barn. & A. 218; 11 Price R. 68.

And if an offending party being summoned to attend the court to answer for the contempt by an order issued for that purpose, should not appear, the court has jurisdiction to impose a fine on him in his absence.

*In re Clement*, 11 Price, 68.

A judge at *nisi prius* has the power of fining a defendant for a contempt committed by him in the course of addressing the jury.

Rex v. Davidson, 4 Barn. & A. 329. ||

(C) In what Actions or Proceedings there ought to be a Fine or an Amercement: and herein,

1. *Of the Nature of the Action in which there ought to be a Fine or Amercement.*

It seems that regularly there was a fine or amercement in all actions; for if the plaintiff or demandant did not prevail, it was thought reasonable that he should be punished for his unjust vexation; and therefore there was judgment against him, *quod sit in misericordiâ pro falso clamore*.

2 Co. 39; F. N. B. 75.



(C) In what Actions there ought to be a Fine, &c.

Hence, when the plaintiff took out a writ, the sheriff, before the return of it, was obliged to take pledges of prosecution, which, when fines and amercements were considerable, were real and responsible persons, and answerable for those amercements, but being now so very inconsiderable that they are never levied, there are only formal pledges entered, viz. John Doe and Richard Roe.

Vide tit. *Bail*.

In all actions, where the judgment is against the defendant, it was to be entered with a *miseriordiā*, or a *capiatur*. And herein the difference is, that if it be an action of debt, or founded on a contract, the entry is *ideo in miseriordiā*, without asserting any sum in certain, which was afterwards affected by the coroners in the proper county; but, if it were in an action of trespass, the court set the fine and levied it by a *capiatur*.†

8 Co. 60; Ro. Abr. 212, 219; Cro. Eliz. 844; Cro. Ja. 255. † But see *infra* the stat. 5 & 6 W. 3, c. 12.

And therefore in all actions *quare vi et armis*, as rescous, trespass, &c., the defendant shall be fined.

8 Co. 59; Ro. Abr. 222.

So, in a writ of recaption in the Common Pleas, if judgment be given against the defendant, he shall be fined and imprisoned; but in a writ of recaption in the county court, if the defendant be convicted he shall only be amerced.

8 Co. 41 a, 60 b; 11 Co. 43; F. N. B. 73.

In an attaint against him who recovered in the first action, if the plaintiff recovers, the defendant shall be (a) amerced.

Ro. Abr. 212. (a) But in 8 Co. 60, it is said, that if the attaint pass against the defendant, if he was party to the first record, he shall be fined and imprisoned; otherwise, if he was not a party to the first record.

If a man recovers in an assize, and dies, and his wife is endowed, in an attaint against his wife, if he recovers, the wife shall be (b) amerced.

40 Ass. 20; Ro. Abr. 212. (b) But not fined, because not party to the first record. 8 Co. 61.

In an action upon the (c) statute of Marlebridge, for driving a distress into another county, the defendant shall be ransomed, (which admits that he shall be fined.)

30 Ass. 38; Ro. Abr. 219. (c) 52 H. 3, c. 4, which see explained, 2 Inst. 106.

In an assize of rent, if the tenant be found guilty of a disseisin with force, because of a rescue done by him, without *vi et armis*, he shall be fined, though this be not within the statute.

33 H. 6, 206; Ro. Abr. 219; || Br. *Fine sur Contempts*, pl. 40, cites S. C. S. P. in assize, [generally as it seems,] but otherwise if the disseisin be found without force; for there he shall be only amerced, for the writ of assize does not mention *vi et armis*, but *injuste et sine judicio disseisivit*. 8 Co. 59 b. M; 6 Ja. in Scac. *per Cur.* in Beecher's case, cites S. C. S. P. accordingly by reason of the force; and if the defendant brings certificate of Assize, which is returned *tarde*, yet *capias pro fine* shall issue. So, if the defendant brings Attaint; but contrary upon writ of error. Br. *Fine sur Contempts*, pl. 46, cites 33 H. 6, pl. 21, Vin. Abr. *Amercement*, (Z) pl. 3, note. ||

In all judicial writs, if the plaintiff is barred, nonsuit, or his writ abates, the plaintiff shall not be amerced, (d) because the process is founded upon a record.

8 Co. 61 a. (d) That a man shall not be fined in an *audita querela*. 12 H. 4, 15 b; Ro. Abr. 219.

(C) In what Actions there ought to be a Fine, &c.

But as fines and amercements in those actions, by not being levied, became matter of form, it was thought hard, that for any irregularity herein a judgment should be arrested; and therefore,

By the 16 & 17 Car. 2, c. 8, it is enacted, "That no judgment after verdict, confession by *cognovit actionem*, or *relietâ verificatione*, shall be reversed for want of *misericordiâ*, or *capiatur*, or by reason that a *capiatur* is entered for a *misericordiâ*, or a *misericordiâ* is entered where a *capiatur* ought to have been entered."

For which vide tit. *Amendment and Jeofail*.

And by the 5 W. & M. c. 12, reciting that divers suits and actions of trespass, ejectment, assault, and false imprisonment, brought by party against party in the respective courts of law at Westminster; and upon judgment entered against the defendant or defendants in such suits or actions, the respective courts aforesaid do (*ex officio*) issue out process against such defendant and defendants for a fine to the crown for a breach of the peace thereby committed, which is not ascertained, but is usually compounded for a small sum of money, by some officer in each of the said courts, but never estreated into the Exchequer; which officers, or some of them, do very often outlaw the defendants for the same, to their great damage; therefore it is enacted, "That no writ or writs, commonly called *capias pro fine*, in any of the said suits or actions in any of the said courts, shall be sued out or prosecuted against any of the said defendant or defendants, or any further process thereupon, but the same fines, and all former fines, yet unpaid, are and shall hereby be remitted and discharged for ever. Yet nevertheless the plaintiff or plaintiffs in every such action shall (upon signing judgment therein, over and above the usual fees for signing thereof) pay to the proper officer, who signeth the same, the sum of six shillings and eight pence, in full satisfaction of the said fine, and all fees due for or concerning the said fine, to be distributed in such manner as fines and fees of this kind have usually been, and not otherwise; which said officer and officers shall make an increase to the plaintiff or plaintiffs of so much in their costs, to be taxed against the said defendant or defendants."

But, though this statute takes away the *capiatur* fine, yet it is said to be the practice of the Court of Common Pleas, to make a special entry of the judgment in this manner, *nihil de fine quia remittitur per statutum* in the same manner as where the fine was pardoned, in which case the entry was *nihil de fine quia pardonatur*.

Salk. 54; Comb. 387.

But it was ruled on debate in the King's Bench, that this statute having taken away the fine, there was no judgment of *capiatur* to be entered against the defendant, nor any thing in lieu thereof, but that clause was totally to be left out of the judgment, for that it was not like the case of a pardon, which does not alter the law, but only excuses that party, so *nihil de fine quia pardonatur*.

Lindsey v. Sir Talbot Clerk, Carth. 390; Salk. 54, S. C.; Comb. 387, S. C.

## 2. At what Time to be Awarded.

If in a real action the tenant comes the first day and renders the land, he shall not be amerced.

Co. Lit. 126; 5 Co. 49; Cro. Eliz. 65; Cro. Car. 564; 8 Co. 61.

So, in detinue for a box of charters by the heir, upon the delivery of his

(C) In what Actions there ought to be a Fine, &c.

father ; if the defendant comes the first day, and says, that he hath been always ready to tender them, and yet is, if the plaintiff does not traverse this, the defendant shall not be amerced.

38 E. 3, 20 ; Ro. Abr. 212.

In a *cui in vita*, if the tenant vouches, and the vouchee comes the first day of the summons and tenders, yet he shall be amerced ; for when the tender is not at the first day of the original, an amercement is due to the king.

14 E. 3, 16 ; Ro. Abr. 212.

In an account, if the defendant comes the first day and tenders the money, and the plaintiff accepts it, none of them shall be amerced.

2 R. 2, 45 ; Ro. Abr. 213.

So, in an account, as receiver of 10*l.*, if the defendant pleads, never his receiver, and this is found against him, by which he is adjudged to account ; and after he comes and tenders the 10*l.*, and makes oath, that after the time that the money was delivered to him, he could not find any thing to buy for profit, this shall be a good discharge of the defendant, and neither he nor the plaintiff shall be amerced.

46 E. 3, 40 ; Ro. Abr. 212.

In dower, if the tenant, after he is (a) essoined, renders dower, and avers, that he hath always been ready, &c., the tenant shall not be amerced.

22 E. 3, 2 ; Ro. Abr. 212. (a) But, if the tenant tenders to the demandant her dower, after she hath taken a day *prece partium*, he shall be amerced, though this delay was by the assent of the demandant. 18 E. 3, 39 ; Ro. Abr. 212, S. C., but a *quare* is added.

In a writ of dower, if the tenant vouches the heir of the baron, and the vouchee demands the lien ; and upon this the vouchee enters into warranty, as he who hath nothing by descent, &c., and the tenant says that he hath assets by descent ; upon which judgment is given, that the demandant shall recover against the tenant, &c., the vouchee shall be *in misericordiâ*, though he doth not counterplead the warranty.

18 E. 3, 14 ; Ro. Abr. 212.

If in an action of debt the defendant comes the first day, and appears by attorney, and makes defence, *scilicet, defendit vim et injuriam quando*, &c., and after the attorney pleads *non sum informatus*, the defendant shall be amerced ; for he ought to have acknowledged the action the first day, and not to have made any defence.

Ro. Abr. 213, *Hobberly v. Lewis*, adjudged.

So, if in debt the defendant comes the first day, and imparls till the next term, and then judgment is given upon *non sum informatus*, the defendant shall be amerced. || Rolle adds, "adjudged *quod capiatur* ; but it seems as if this was mistaken." ||

Ro. Abr. 213, *Dame Slaney v. Vawtreys*.

But if, in an action of debt, the defendant comes the first day by attorney, and says, that *non est informatus*, and thereupon judgment is given, the judgment shall be against the defendant for the debt, damages, and costs ; but *nihil in misericordiâ quia venit primo die per summonitionem*, because this is all one, as to the plaintiff, as if he had confessed the action, for he is not more delayed by this, and this is the course of the Common Pleas in such cases.

Ro. Abr. 213, *Barecroft v. Rooks* ; *Yelv.* 108, *Dismo v. Sherley*, S. P. adjudged.

(C) In what Actions there ought to be a Fine, &c.

If in a writ of entry, *in le quibus* in Wales, the defendant pleads *non disseisivit*, and pending this plea, a general pardon is made by parliament, by which all fines, amercements, &c., are pardoned, and after judgment is given for the demandant, yet the tenant shall not be amerced for the delay after; for the not rendering the first day, according to the command of the king's writ, is the cause of the amercement, and that is pardoned.

5 Co. 49, Hall v. Vaughan, adjudged; Moore, 394, S. C. adjudged; Co. Lit. 126; Jenk. Cent. 258, S. P.

If in debt against executors the defendants do not appear the first day, but after come and plead *plene administraverunt*, and thereupon the plaintiff prays judgment *quando assets acciderint*, he shall have such judgment, and the defendants shall be amerced. And though in this case it did not appear, by the record, but that the defendants pleaded the day of the declaration, yet *per* Vaughan, C. J., it shall not be so intended, unless entered *venerunt primo die*.

Vent. 96, Noel v. Nelson, adjudged; Sid. 449, S. C., *adjournatur*; Lev. 286, S. C. adjudged, and said it was after imparlance. Sand. 226, S. C. adjudged, and there said by Sanders, that it was not law; for though they delayed the plaintiff, yet by their subsequent plea they excused themselves of the *tort*; as if in a *quare impedit* a bishop impairs, and after pleads *he claims nothing but as ordinary*, he shall not be amerced, because he hath excused himself of the wrong; but *quare* of this reason, because in this very case the bishop shall be amerced, as appears by Hob. 200; Cro. Ja. 93.

If the plaintiff be nonsuit, or if a writ abate by the (a) act of the plaintiff or demandant, or for matter of form, the plaintiff or demandant shall be amerced.

Co. Lit. 127; 8 Co. 61; Ro. Abr. 219. (a) But, if a writ abate by the act of God, the plaintiff or demandant shall not be amerced. Co. Lit. 127; 8 Co. 61, S. P. So, in trespass for taking his corn, if upon the pleading the right of the tithes come in question, by which the writ abates, yet the plaintiff shall not be amerced, because there was not any default in him. 38 E. 3, 6 b; Ro. Abr. 213, S. C.

In an action brought by two, if the writ abate (b) by the death of one of them, the other shall not be amerced, because it is by the act of God, without the default of the party.

43 Ass. 18; 43 E. 3, 23; Co. Lit. 127; Ro. Abr. 213. (b) [Such an abatement is now prevented by 8 & 9 W. 3, c. 11, § 7.]

So, if two join in a personal action, and one is nonsuit, which in law is the nonsuit of the other, yet the other shall not be amerced, because this is not his fault.

47 Ass. 3; 8 Co. 61.

If one demandant or plaintiff is nonsuit in such action, wherein summons and severance lies, and the other proceeds therein, he that is nonsuit shall not be amerced.

8 Co. 61 a.

### 3. Whether to be awarded when the Party is acquitted as to Part.

It seems to be a general rule, that if part is found for the demandant or plaintiff, and part against him, he shall be amerced.

8 Co. 61 a.

As, if in action of covenant for several covenants broken, the plaintiff be barred for one, he shall be amerced for this, though he recovers for the other.

Ro. Abr. 216; Wassel and Yelton, Ro. Rep. 411, S. C.

So, in an action upon the case upon a promise to do two things, *scilicet*

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to pay so much for certain land sold, and if the vendee sells it again for more than he paid, to pay so much more; and the defendant pleads in bar a release, which is adjudged no bar for part, (*scilicet* for the last sum,) and a bar for the first sum; he shall be *in misericordiâ* for this sum of which he is barred, though it be an entire promise; and he could not have an action but upon both parts, for he might have acknowledged himself satisfied of that which he had released.

Ro. Abr. 216; Ro. Rep. 411; 3 Buls. 230, S. C. adjudged upon a writ of error and the judgment affirmed accordingly.

If the plaintiff declares that he was possessed of a hoy, floating at anchor in the river Thames, loaded with goods, and that the defendant *satis sciens*, being master of a ship sailing in the river, so negligently governed his said ship, that she *in prædict. naviculam* of the plaintiff *violenter ruebat, et illam fregit et submersit*; and upon not guilty pleaded the jury find, that *quoad negligentem gubernationem navis præd. defend. per quod in naviculam querentis violenter ruebat, et illam fregit et submersit*, the defendant is guilty, *et quoad residuum præmissorum* that he is not guilty, the plaintiff shall not be amerced; for there is no *residuum*, and the first part of the verdict comprehends all the injury complained of in the declaration.

Mustard v. Harnden, Sir T. Raym. 390.

In an action of waste *in domibus et gardino*, if upon the writ of inquiry of waste the defendant be found guilty *in domibus*, and not guilty *in gardino*, the plaintiff shall be *in misericordiâ* (a) for the garden.

14 E. 3, 27; Cro. Car. 453, S. C. cited and agreed, because he counts for waste in places where no waste was done. But, where waste is assigned in cutting down twenty trees, and the waste is found in cutting down two trees only, and so the variance in quantity, it is otherwise. (a) So, if in case the plaintiff declares he is seised of two hundred acres, to which he hath common appurtenant, and that the defendant inclosed, *per quod*, &c., and the jury find that he hath only ninety acres, parcel, &c., he shall be *in misericordiâ* for the residue. Palm. 270.

In (b) trespass for the battery of his servant, and the taking of his timber, if the defendant be found guilty of the taking of the timber, and not guilty of the battery of the servant, the plaintiff shall be amerced for this.

22 Ass. 76; Ro. Abr. 217, S. C.; Moore, 692, S. P.; Dyer. 89, pl. 111, like point; (b) So, in debt, where part is found for the plaintiff, and part for the defendant. 2 Sid. 137; Cro. Eliz. 699.

If in debt upon the statute of H. 8, for buying titles, the plaintiff demands 50*l.* for the value of the land, and the jury find the value but 20*l.* the plaintiff shall have judgment, &c., but shall be amerced *quoad* the residue of the 50*l.*

Cro. Eliz. 257, Savery v. Tey.

But in trespass, or other actions where the plaintiff declares *ad damnum*, if less be found than he declares for, yet the plaintiff shall not be amerced, because the action is founded upon an uncertainty.

Cro. Eliz. 257, *per Curiam*.

In replevin, if the defendant avows the taking of two several distresses, for several causes, and issue is joined upon the taking of one distress, and found for the plaintiff, and a *nolle prosequi* entered as to the other, the plaintiff shall not be amerced.

2 Sid. 136, *per Curiam*.

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4. *Whether to be awarded where there are several Parties, and some of them only acquitted.*

If all or part is found against one tenant or defendant, and nothing or but part against the other, the demandant or plaintiff shall be amerced, unless there be no default in him.

8 Co. 61.

In an assize against two, if it be adjudged against one upon his plea, and the demandant release his damages, and have judgment presently for the land against him, relinquishing his suit against the other, he shall not be amerced for the other.

44 Ass. 33; 44 E. 3, 24; Ro. Abr. 217.

In trespass against several, one is found guilty, and the plaintiff prays judgment against him, relinquishing his suit against the rest, he shall not be amerced for them.

44 Ass. 33; 44 E. 3, 24; Ro. Abr. 217.

In trover and conversion of one thousand loads of coals against three persons, if one of the defendants is found guilty of one hundred loads, and not guilty of the rest, and another guilty of one hundred loads, and not guilty of the rest, and the third guilty of one hundred loads, and not of the rest, in this case the plaintiff shall not be amerced against any of them, because each of them is found guilty of part, though severally.

Ro. Abr. 217, Warne and Player; Cro. Car. 54, 55, S. C.

In an assize against two, if the plaintiff recovers against one, and the other is found not guilty, the plaintiff shall be amerced as to him.

23 Ass. 18; Dyer, 312.

In a writ of forcible entry against several, for entering with force, and holding out with force; if some are found guilty of the forcible entry, and not guilty of the holding out with force, the plaintiff shall be *in misericordiâ* for this.

19 H. 6, 32; Ro. Abr. 216.

So, if some are found guilty of the holding with force, and that they entered peaceably, the plaintiff shall be amerced for this.

19 H. 6, 32; Ro. Abr. 216.

If a man brings an assize against the tenant and disseisor of a rent-service, and the tenant is acquitted, and the disseisor found guilty, the demandant shall be amerced for the tenant.

17 E. 3, 46; Ro. Abr. 216, S. C.

So, in an assize of a rent against one tenant and two disseisors, if he recovers against the tenant and one disseisor, and the other is acquitted of the disseisin, the demandant shall be amerced for him.

31 Ass. 31; Ro. Abr. 216, S. C.

5. *Of awarding Fines and Amercements jointly or severally.*

If there are several defendants, and all of them convicted, a joint award of one fine against them all is erroneous, for it ought to be severally against each defendant; for otherwise one, who hath paid his proportionable part, might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another.

11 Co. 43; Ro. Rep. 74; Dyer, 211; Lev. 125.

If at a court-leet twelve of the inhabitants, time out of mind, by the steward, have been sworn chief pledges, who at every leet have used to

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present, that the said chief pledges should pay to the lord of the leet 10*s. pro certo letæ*, and accordingly have paid it at the said leet; if at a court-leet twelve chief pledges being sworn to inquire of the articles of the leet, refuse to present, that they ought to pay 10*s. pro certo letæ*, the steward cannot impose one joint fine upon them all, but must fine them severally; for the refusal of one is not the refusal of the other.

11 Co. 42, Godfrey's case; Ro. Rep. 32, 73, S. C.

If in an assize against two the disseisin is found with force, though the disseisin was joint, yet the fine shall be several.

11 Co. 43 a.

If in a plaint two are nonsuited, the amercement shall be several.

11 Co. 43 a.

And though the judgment be against two, and *ideo in misericordiâ*, yet when it is affected by the coroners *in pais*, the amercement shall be laid on them severally.

11 Co. 43 a.

So, if there are several defendants, and by law they are to be fined, though in the entry of the judgment it is *ideo capiuntur*, yet it shall be taken *reddendo singula singulis*, and there shall issue several *capias pro fine*.

11 Co. 43.

Yet in some cases a fine or amercement shall be imposed upon several jointly, as upon a county, hundred, and so upon a village, &c.; as for the escape of a murderer, &c., because of the uncertainty of the persons, and the infinity of their number.

11 Co. 63 b.

In trespass against two, if one be found guilty to damage *quoad* him, and the other is found guilty to damage *quoad* him; in this case each defendant shall be amerced severally, and the plaintiff shall also be severally amerced *quoad* each of them.

5 Co. 58.

#### 6. Whether the Party can be twice amerced in the same Action.

It is laid down as a rule, that a defendant shall not be amerced twice in the same action, for that would be to punish him twice for the (a) same offence.

8 Co. 61 a; Ro. Abr. 218. (a) But where one defendant may be amerced several times for several defaults in the same action, vide 2 Leon. 4, 5, 185, 186.

In a *quare impedit*, if the plaintiff recovers the presentation against the defendant, and thereupon judgment is given upon demurrer for a writ to the bishop; and upon this the defendant is amerced, and after, a writ is awarded to inquire of the damages and the other points of the writ, and found accordingly, and judgment also given; for this the defendant shall not be amerced again.

5 Co. 58 b; Ro. Abr. 218.

In an action against the same defendant or tenant, if the defendant or tenant pleads one plea to part, and another plea to the rest, or confesses part, and pleads to issue for the other, and several issues are found against him, yet the defendant or tenant shall not be twice amerced.

5 Co. 58; Ro. Abr. 218.

If in an *ejectione firmæ* against four, three are found guilty, *quoad* part,

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and not guilty for the residue, and the fourth is found not guilty generally; the plaintiff may be amerced jointly *quoad* all the defendants, *scilicet, pro falso clamore quoad* the three, for so much of which they were found not guilty, and *pro falso clamore quod* the fourth, *quod sit misericordiâ*. And the prothonotaries said the usual course was so, and sometimes otherwise, *scilicet*, that *quoad* the three for so much, &c., he be *in misericordiâ*, and *quoad* the fourth, that he be *in misericordiâ* also.

Cro. Car. 178, Deckerow et al. v. Jenkins.

In dower defendant confesses as to part, and judgment is given against him *quod sit in misericordiâ*, and as to the rest he pleads in bar, upon which there is a demurrer, and judgment is given against him, *quod sit in misericordiâ*. It was objected in error, that a man ought not to be twice amerced in the same action; but it was holden well enough in this case, because both judgments are final and independent of one another; but, according to the report of this case in Salkeld, it would be otherwise where one judgment is only interlocutory and depends upon another, as (a) *quod computet* in account.

Lord Gerrard v. Lady Gerrard, Salk., 54, 253; Ld. Raym. 72, S. C.; Comb. 352, S. C. and S. P.; 5 Mod. 64, S. C. and S. P.; Skin. 592, S. C. and S. P. adjudged, because the second amercement was for a new delay, (a) That in account, if the defendant be adjudged to account, judgment shall be presently before the final judgment, *quod sit in misericordiâ quia non prius computavit*; and in this case, if he be afterwards found in arrearages, judgment shall be again, *quod sit in misericordiâ*. Ro. Abr. 218, Parrey's case adjudged, and affirmed upon a writ of error, and said by the clerks to be the course of the court.

(D) Where a Fine ought to be awarded, and not an Amercement; and *vice versâ*.

WE have already taken notice of the difference made between offences, and that for the *delicta majora*, such as breaches of the peace, contempts or disturbances committed *in facie curiæ* the court may (b) fine and imprison; but that in real actions or actions of debt, the defendant is only to be (c) amerced.

8 Co. 39; Hob. 180. (b) For the various significations of the word *fine*, vide 8 Co. 59; Co. Lit. 126.—And that there is no difference between a fine and *ransom* in a legal understanding; for a fine makes an end of the business, and so does a *ransom*, because it redeems from imprisonment; and if they were different things, it would follow, that where the books say that a man shall make a fine and ransom, they must be taken to intend, that he ought to pay two different sums, of which there is no precedent, Co. Lit. 127 a; but in Dyer, 232, pl. 5, it hath been adjudged, that where a man is to make fine and ransom, the ransom must be treble the fine at least. (c) That if a sheriff, having returned a *cepi corpus* into the King's Bench, on a *capias* against a man on an indictment of felony, does not bring him in at the day, it seems that he is by the course of the said court to be amerced, not fined. 40 Ass. pl. 42.—So, if a vil or hundred suffer a felon to escape without being arrested, they are to be amerced, not fined. 3 Inst. 53; Dyer, 210; 4 Inst. 294.—But whether the punishment inflicted on a jailer for suffering a criminal negligently to escape, be properly a fine or an amercement, *qu.* and vide 8 H. 5, 2; Fitz. Coron. 84, 292; Rast. Ent. 583; 27 Ass. pl. 9.

A man shall be fined and imprisoned for all contempts (d) done to any court of record, against the commandment of the king's writ under his great seal, as in a *quare non admisit, quare incumbravit*, attachment upon a prohibition, &c.

8 Co. 60. (d) So, in replevin it was adjudged for the avowant, a *retorno habendo* awarded, and there the sheriff returned an *elongata*, and a *withernam* was awarded, though the plaintiff brought the money into court, and prayed the process might be stayed; yet the court would not grant it till they had assessed a fine upon the plaintiff. 2 Leon. 174.



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But when the demandant or plaintiff, tenant or defendant *se retraxit*, or *recessit in contemptum curiæ*; yet this is no contempt against the commandment of the king by writ, and therefore he shall not be fined in such case, but amerced only.

8 Co. 58, Beecher's case; Cro. Ja. 211, S. C. and S. P.

If in replevin the defendant claims property falsely, and this in a *proprietary probandâ* is found against him, he shall be fined and imprisoned.

8 Co. 60 a.

If one denies a recovery or other record to which he himself is party, he shall not be fined; for it is not his act, but the act of the court; and he does not deny the record absolutely, but *non habetur tale recordum*.

8 Co. 60 a.

In an assize, if the tenant be attainted of a disseisin with force, he shall be imprisoned.

Ro. Abr. 222, and several cases there cited out of the Year-books to this purpose.

But in an assize for a rent-seek, if the defendant be found a disseisor by denier only, the judgment shall not be *quod capiatur* but only in *misericordiâ*.

Ro. Abr. 223.

Also, in an assize of a rent-charge against several tertenants; if it be found the plaintiff distrained for this, and one of the defendants, without consent of the rest, made the rescous, though the others are disseisors by the denier; (a) yet they shall not be imprisoned, but only he who made the rescous.

39 Ass. pl. 4; Ro. Abr. 223. (a) For he who made the rescous is the only disseisor with force. Co. Lit. 161 b.

In an assize, if the tenant by his plea does not deny the ouster, though he be after found a disseisor without force, yet he shall be imprisoned.

28 Ass. 15; Ro. Abr. 222, S. C.

In an assize of nuisance, if the defendant be found guilty, he shall be imprisoned.

19 Ass. 16; Ro. Abr. 222, S. C.

Although in all actions (b) *quare vi et armis*, as rescous, trespass, &c., the defendant shall be fined; yet (c) in actions of (d) trespass upon the (e) case, if the defendant be found guilty, the judgment shall not be *quod capiatur*, but *quod sit in misericordiâ*.

(b) 8 Co. 59 b; Ro. Abr. 222. (c) 8 Co. 59; Hob. 180. (d) That in trespass or other actions, where the plaintiff declares *ad damnum*, if less be found than he declares for; yet the plaintiff shall not be amerced, because the action is founded upon an uncertainty. Cro. Eliz. 257. (e) So, in an action against an inn-keeper for goods stolen, the judgment shall not be *quod capiatur*. Cro. Ja. 224, adjudged.

But in trespass, if the plaintiff declares that he levied a plaint in London, and upon process J S was arrested by a sergeant, and that the defendant *vi et armis* rescued him, *per quod* he lost his debt; and upon not guilty pleaded, it be found for the plaintiff; the judgment hereupon ought to be *quod defendens capiatur*; for though the nature of the action is properly an action upon the case, as touching the loss of the debt of the plaintiff; yet this being with force to the sergeant, who was a minister as well to the plaintiff as the court, the plaintiff may count *vi et armis*.

Hob. 180, Wheatley and Stone; Ro. Abr. 222, S. C.

(D) Where a Fine ought to be awarded, &c.

If a man denies his own deed, and this is found against him by verdict, he shall be imprisoned for his falsity, and trouble to the jury.\*

Ro. Abr. 220, 224; 2 Bulst. 230, S. P. \**Qu.* If this is now law.

But, if a man, where his own deed is pleaded against him, pleads *non est factum*, and after at the *nisi prius*, or before verdict, *relictâ verificatione cognoscit* this to be his deed, he shall not be imprisoned, but only amerced.

But for this vide 8 Co. 60; Ro. Abr. 224; Keilw. 42; 2 Ro. Rep. 45; Noy, 4; Cro. Ja. 64; Dyer, 67; Raym. 202; Mod. 73; 2 Saund. 189; 2 Keb. 678, 688, 694, 734.

If a man pleads a deed of the plaintiff or his ancestor, made to the ancestor of the defendant who pleads it, and this is found against him, he shall not be imprisoned for his falsity, because he could not know whether this was his deed or not, being made to his ancestor.

20 Ass. 10; Ro. Abr. 224.

In trespass *contra pacem*, for trampling his corn; if it be found that the cattle of the defendant escaped, but not *contra pacem*, and trampled the corn, yet the defendant shall be imprisoned, for he ought to keep his cattle at his peril.\*

27 Ass. 56; Ro. Abr. 222, S. C. \**Qu. de hoc*, if now law?

In an action upon the case, upon an *assumpsit*, if the defendant be found guilty, the judgment shall not be *quod capiatur*, but *quod sit in misericordiâ*.

Ro. Abr. 222, 223.

In a writ of deceit against the party who recovered in a real action and the sheriff, if it be found that no summons was made, he that recovered before shall be imprisoned.

Ro. Abr. 223; 8 Co. 59, S. P., because founded upon the deceit done to the court in obtaining judgment.

In all cases where a thing is restrained by any statute, the offender shall be fined and imprisoned.

8 Co. 60 b; Cro. Ja. 631; like point adjudged, 12 Co. 134; like point resolved, 2 Inst. 131; 2 Ro. Rep. 400.—In an action of *scandalum magnatum*, whether the judgment ought to be *quod defendens capiatur*, *dubitatur*; Probee and the Marquis of Dorchester, Sid. 233, adjourned; Keb. 813, adjourned upon a writ of error. Lev. 148. *dubitatur*; but the court inclined, that if it was *in misericordiâ*, it was sufficient.

As in an action upon the statute of Marlebridge for driving a distress out of the county, the defendant being found guilty shall be imprisoned.†

30 Ass. 38; Ro. Abr. 222. †*Qu. de hoc*, if now law?

So, in an action of debt upon the statute of 1 & 2 Ph. & Mar. c. 12, of distresses, by which the defendant shall forfeit to the party grieved, for the driving a distress out of the hundred, 5*l.*, and treble damages; if the defendant be found guilty, the judgment shall be *quod capiatur*.

Ro. Abr. 222.

In an action of debt upon the statute of usury, for treble the sum lent for taking more than 8*l.* per cent., if the defendant be found guilty, the judgment shall be *quod capiatur*, because he took it contrary to the provision of the statute.

Ro. Abr. 223, Lovell and Bidgood.

But in an action of debt upon the statute of 2 & 3 E. 6, c. 13, for not setting forth tithes, if judgment be given for the plaintiff, the judgment shall be *quod sit in misericordiâ*, and not *quod capiatur*; (a) because this is but a debt given in recompense for tithes, and this is the usual course.

Ro. Abr. 223; Sid. 233, S. P. *arguendo*. (a) In debt for 5*l.* upon the statute of 1 &

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2 Ph. & Mar. c. 12, for taking above 4*d.* for a distress, the defendant shall be *in misericordiâ* only, because this action is founded upon the non-payment, and not upon the statute. Cro. Car. 560, adjudged.

So, in an action for a robbery founded upon the statute of Winchester, if the defendants are found guilty, the judgment shall be *quod sint in misericordiâ*; because this action is not founded upon any *male-feasance*, but upon a *non-feasance* only.

Cro. Ja. 350, Oldfield v. The Hundred of Witherly.

In an action of trespass for an assault and battery; if the battery was done before a general pardon, by which the fine is pardoned, yet the judgment shall be entered (*a*) *quod capiatur*; for the court need not take consueance thereof without demand.

Cro. Car. 32, Swayn and Rogers, adjudged. (*a*) The entry in this case is sometimes *quod capiatur*, and sometimes *quod non capiatur quia pardonatur*; but for this vide Cro. Eliz. 153, 778; Leon. 300; Brownl. 211; Yelv. 126; 5 Co. 49; Moore, 394; Jenk. Cent. 258; Lane, 71; Salk. 54, pl. 2.

(E) Who, in respect of their Persons, are not to be fined or amerced.

The king being plaintiff or demandant shall not be amerced, nor shall the (*b*) queen consort.

Co. Lit. 127; 8 Co. 61; F. N. B. 31; 3 Bulst. 276. (*b*) Where the judgment is against the queen, *et in misericordiâ nihil eo quod consors regis*. Ro. Abr. 215.

An infant being plaintiff or demandant shall not be amerced, and this is the reason (*c*) he shall not find pledges.

Co. Lit. 127; 8 Co. 61; 3 Bulst. 276; Palm. 518; Ro. Abr. 214. 288. (*c*) That he shall not find pledges. Cro. Car. 161, adjudged.

But an infant defendant shall be amerced, if he pleads with the demandant, and the matter is found against him; (*d*) but he shall be pardoned of course.

Ro. Abr. 214; Cro. Car. 410. (*d*) And the entry in such case is *ideo in misericordiâ sed pardonatur quia infans*. 8 Co. 61; Palm. 518. *Nihil in misericordiâ, quia infans*. Cro. Car. 410.

But, if an infant brings an action by his *prochein amy*, and pending the action comes of full age, and makes an attorney, and after is *non-suit*, he shall be amerced.

Dyer, 338, pl. 41.

If an infant brings an action of trespass by guardian against two, and the defendants plead not guilty, and at the *nisi prius* the plaintiff appears in person, and a verdict is found for the plaintiff for part, and not guilty for the rest, and one of the defendants not guilty, and judgment is given for the plaintiff for that for which the verdict is given for him, *et quod nil capiat per billam* for the rest; and as to him that is found not guilty, *sed nihil de misericordiâ pro falso clamore, &c., quia querens tempore transgressionis prædictæ factæ infra ætatem existerat*; yet this is good, and no error.

Ro. Abr. 214, Methwold and Anguish, adjudged.

If a *præcipe* is brought against an infant, and pending the plea he comes of full age, he shall be amerced for the delay after he comes of full age.

5 Co. 49; Moore, 394; Ro. Rep. 294; 3 Bulst. 251.

If baron and feme are vouched in the right of the feme, and judgment

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is given against them, and the feme is to be amerced, they shall be amerced, (e) though the feme be within age, the husband being of full age.

16 E. 3, 14; Ro. Abr. 14. (e) And this amercement shall not be pardoned of course. 16 E. 3, 14.

In an action upon the case against baron and feme for scandalous words spoken by the feme, and judgment given against both, as well the husband as the wife shall be amerced.

Hob. 127.

In an action of trover and conversion against baron and feme, for the conversion of the feme during the coverture; if the feme be found guilty by verdict, and the baron not guilty, yet both shall be *in misericordiā*; for the amercement is not for the conversion, but for the delay of the suit and the non-rendering the first day, of which the baron is as well guilty as the feme.

Ro. Abr. 215; Cro. Ja. 439, 440; Ro. Rep. 293; 3 Bulst. 151, S. C. adjudged.

In a writ of dower, if the tenant vouches the baron and feme, as in the right of the feme, as heir to the husband of the demandant, and the vouchers demand the lien, upon which the lien is shown, and they enter into warranty, as those who have nothing by descent; and the tenant says, that they have by descent, upon which judgment is given against the tenant, &c., the feme only shall not be amerced without the baron, but both.

Ro. Abr. 215, 216.

If a feme covert sues a groundless appeal of the death of her husband, known by her to be alive, she shall be fined.

Bro. Appeal, 25; 8 H. 4, 17, pl. 2.

In an assize against baron and feme, if the feme be received upon the default of the baron, and plead in bar, and acknowledge an ouster, and the demandant take issue upon the bar, and this be found for the demandant, the tenant shall not be imprisoned for this confession of an ouster, (a) because she is a feme covert.

37 Ass. 1; Ro. Abr. 220. (a) But, if a feme covert be found guilty of a trespass before the coverture, she shall be imprisoned. 22 Ass. 87; Ro. Abr. 220.

If a baron of parliament be found a disseisor with force in an assize, the judgment against him shall be *quod capiatur*.

Ro. Abr. 220, *Ld. Stafford's case*; Cro. El. 170, S. C. adjudged; for that it is upon a disseisin found, in which case a fine is given by the statute of Westm. 1, c. 36; || and no person being exempt therein, it shall bind a nobleman as well as any other. || Vide 2 Inst. 236.—And Hob. 61, that barons are not subject to imprisonment, but for great contempt.

So, in a debt upon an obligation against a baron of parliament, if the defendant pleads *non est factum*, and the issue is found against him, the judgment against him shall be *quod capiatur*.

Ro. Abr. 220, 221, *Earl of Lincoln and Flower*; Cro. Eliz. 503, S. C. adjudged || and affirmed in error, because upon this plea found against him a fine is due to the queen, and none shall have privilege against her, and therefore a *capias pro fine* well lies. ||

(F) Of the Reasonableness of the Fine: And herein of mitigating or aggravating it.

WHERE a person is convicted of a criminal offence, for which he ought to be fined, the measure thereof is left to the discretion of the judges, who proportion such fine, so as to make it adequate to the offence, from the consideration of the baseness and enormity, and dangerous tendency of it; the

(G) Of the Reasonableness of an Amercement, &c.

malice, deliberation, and wilfulness with which it was committed; the age, quality, and degree of the offender, &c.

2 Hawk. P. C. 48, § 11, vide tit. *Judgment*; and that by *Magna Charta* every fine must be with a *salvo contentamento*, which see explained, 2 Inst. 28. || By the Bill of Rights, st. 1, W. & M. st. 2, c. 2, it is particularly declared, that excessive fines ought not to be imposed, and that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void.||

If a prosecutor accepts costs from the defendant, he cannot, by the rules of the court, aggravate his fine, because, in such cases, having no right to demand costs, if he takes them after, he must take them by way of satisfaction of the wrong; after which it is unreasonable for him to harass the defendant.

Salk. 55, pl. 5.

But as to those costs given by 5 & 6 W. & M. c. 11, on the removing of a cause by *certiorari*, the prosecutor is not restrained from aggravating the fine to be set on the defendant, because he has a right to such costs by the express words of the statute.

2 Hawk. P. C. 292, *contr.*; Salk. 55, pl. 5.

A fine is under the power of the court during the term in which it is set, and may be mitigated as shall be thought proper; but after the term it admits of no alteration.

Co. Lit. 260; Cro. Car. 215; Raym. 376.

If a person is indicted and found guilty of a great nuisance, and a writ goes to the sheriff to abate it, if the party refuses to abate it at his own charge, the court will raise the fine accordingly; *secus*, if the nuisance may be easily removed, as pulling down a wall, &c.

Comb. 10.

Upon a motion to submit to a small fine after a confession of the indictment, which was for an assault; Holt, Ch. Just., took a difference where a man confesses an indictment, and where he is found guilty; in the first case, a man may produce affidavits to prove *son assault* upon the prosecutor, in mitigation of the fines: otherwise, where the defendant is found guilty; for the entry upon a confession is only *non vult contendere cum domino rege, et ponit se in gratiam curiæ*.

Salk. 55, pl. 6, The Queen and Templeman.

If an excessive fine be imposed at the sessions, it may be mitigated at the King's Bench.

Vent. 336.

The court may assess a fine, but cannot award any corporal punishment against a defendant, unless he be actually present in the court.\*

Salk. 56, 400, pl. 4; Comb. 36, 77. \*And therefore the personal appearance of the defendant in such cases is not to be dispensed with, unless by rule of court in motion, and the clerk in court, or some other person approved of, undertaking to pay such fine as shall be set on the offender, &c.

(G) Of the Reasonableness of an Amercement, and the Affeerment thereof: And herein,

### 1. Of the Necessity of an Affeerment.

BEFORE the statutes of (a) *Magna Charta*, and Westm. 1, c. 6, the lords used to set such excessive and grievous amercements on their tenants, that under pretence of such amercements they often seized the whole profit of the tenement which they had granted. To prevent this oppression, and to

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take away all fines and amercements at the will and pleasure of the lord and his steward, and likewise all excessive fines and amercements, if they were never so certain, the statutes appoint, that every (b) amercement shall be affected; so that though the (c) court or homage (d) do award an amercement, yet it is to be affected by the affeors, who are so called, because they *affer* or bring in the quantity of the amercement.(e)

(a) That yet these statutes were in affirmance of the common law. 8 Co. 39; 2 Inst. 27. (b) An amercement in Latin is called *misericordiâ*, because it ought to be assessed mercifully, and this ought to be moderated by affeement of his equals, or otherwise a writ *de moderatâ misericordiâ* lies. Co. Lit. 126 b, for this writ vide F. N. B. 75; Regist. 86, 184, 187. (c) So, that though in the courts of Westminster, where amercements were ordered either against plaintiff or defendant, they were carried down to the coroner to be settled and affected. 8 Co. 39; Saund. 227. (d) In Hob. 129, it is said the jury must amerce to a certain sum, which may be mitigated and affected by others, and therefore these offices cannot be confounded; and so in 3 Lev. 206, that every award of an amercement in a court-leet must express a certain sum; but this opinion has been overruled by a later resolution, where it hath been holden, that though such amercement must be affected, yet the award thereof need not express any particular sum. Salk. 56, pl. 7. [Fitzgib. and 1 Wils. 248, *acc.*] And therefore, in judgment of law, the award of the *misericordiâ* is the act of the court only, and the assessment of the sum to be paid the act of the affeors, and so ought to be pleaded. Kitchen, 51. See Fitzg. 109. (e) || The best derivation of the word *affer* would seem to be from *affeur* in the Customary of Normandy, which the Latin interpreter expresses by *taxare*, that is, to set the value of a thing; and the same with *estimare*. Cowell, voc. *Affeors*, 8 Co. 39 a. In the form of the oath of the Affeors in Kytchin, they were sworn well and duly to *tax, assess, and affer*, &c., words seemingly synonymous. ||

These amercements are to be with a *salvo contenemento*, and were always holden too grievous and excessive, if they deprived the offender of the means of his livelihood; as, if he were a sockman, and the amercement extended to take away the beasts of his plough; if he were a military man, and it extended to take away his arms; if he were a merchant, and it extended to take away his merchandise; if he were a villein, if it took away his cart or wainage; for the words of *Magna Charta* are, *liber homo (a) non amercietur pro parvo delicto, nisi secundum modum illius delicti, et pro magno delicto secundum magnitudinem delicti, salvo sibi contenemento suo, et mercator eodem modo salvâ merchandizâ suâ, et villanus alterius quam noster eodem modo amercietur salvo wainagio suo, si incidit in misericordiam nostram.*

2 Inst. 27, 28, 169; 8 Co. 39. (a) || The stat. of West. 1, 3 E. 1, c. 6, extends this provision to *cities, boroughs, and towns.* ||

But a fine may be set without affeement, for the statute of *Magna Charta* does not extend to those cases where a court of justice may imprison, and where a fine is set by way of mercy, as a ransom and purgation of the offence; for the statute was designed in mercy to the offenders, and not to hinder them from mercy, and so did not extend to offences that might be punished by imprisonment.(b)

8 Co. 39 a, b; 2 Inst. 27; 11 Co. 43; Keilw. 65; Cro. Eliz. 581; Dalt. Sheriff, 400. (b) || However, as it was the object of *Magna Charta* to protect the feud from forfeiture for less offences, as it was in treason and felony; and it would have amounted to a forfeiture of the feud, if fines were so large that they could not be paid out of the person's estate without process for the sale of it; therefore, upon the estreating of fines and amercements, a practice grew up in imitation of the affeement, of issuing writs to the Court of Exchequer to atterminate such debts, and to issue an inquisition to inquire, *quantum inde Regi dare valeat per annum, salcâ sustentatione suâ et uxoris, et liberorum suorum*; and accordingly such debts were reduced into annual payments, according to the annual value of the debtor's freehold. When the debts were thus atterminated, if they were not paid at the time, the whole was levied, because the debts were so

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attenuated according to the contentment of the party; and if he did not pay it according to the attenuation, he plainly endeavoured to avoid the justice of the law, and therefore the whole was immediately to be levied. Gilb. Exch. 99, 100.¶

If at a court baron, according to the custom there used, a by-law is made, and the penalty of 20s. laid upon every offender, and at another court a tenant is presented for a breach thereof, by which the said penalty is forfeited, this cannot be affeered.

Moore, 75; 3 Leon. 7, 8; Bendl. 159, S. C. adjudged.

On the presentment of a nuisance in a torn or leet, the sheriff or steward may either amerce the party, and also order him to remove it by such a day, under a certain pain, or may order him to remove it, under such a pain, without amercing him at all. And the party having notice of such order shall forfeit the pain on a presentment at another court, that he hath not removed the nuisance, without any farther proceeding. And every pain so forfeited may be recovered in like manner as a fine or amercement by distress (a) or action of debt; (b) neither shall it be affeered to a less sum than is at first set.

Leon. 203; Kitchen, 51, 52; Ro. Abr. 468; Cro. Ja. 382; 2 Ro. Abr. 136; Ro. Rep. 201; Allen, 78; 3 Leon. 7, 8. (a) There cannot be a distress without a custom. Ld. Raym. 69. ¶ This means in a court baron; for a fine and all amercements in a leet, a distress is incident of common right. 11 Co. 45 a, b, Cr. El. 748.¶ (b) So, where a certain penalty is given by statute for an offence, of which the leet hath consance, the steward may impose it by way of fine without amercement. Carter, 28, 29.

## 2. By whom the Affeerment is to be.

The award of the amercement is the act of the court, but the taxing or reducing it to a certainty must be done by (c) certain officers called affeerors, chosen and sworn (d) for that purpose; and therefore if an amercement be imposed in a court-leet, (e) and affeered by the (g) jury, and not by sworn affeerors for that purpose, it is a void amercement, and the lord of the leet cannot maintain his action for it.

8 Co. 40 b; 3 Lev. 206. (c) That the amercements on plaintiffs or defendants in the Court of Common Pleas were by the clerk of the warrants made estreats of, and delivered to the clerk of assize within each circuit, to deliver them to the coroners in each county to affeer, and such assessment by the coroners of the respective counties hath been holden a satisfaction of *Magna Charta, quod nulla prædictarum misericordiârum ponatur, nisi per sacramentum proborum et legalium hominum de vicineto*, the coroners being elected by the whole county. 8 Co. 39 b. (d) ¶ See the form of the oath in Kyte. 47.¶ (e) So, a justification for an amercement in a court-baron, without showing it was affeered, is naught. 3 Lev. 19. (g) But it has been holden, that if a jury in a leet tax an amercement, this is sufficient without any other affeerment, for the amercement is the act of the court, and the affeerment of the jury. 8 Co. 40 b; Jon. 301; Cro. Car. 275; Fitz. 109. Vide 2 Ro. Abr. 542.

Although by the express words of *Magna Charta, comites et barones non amercientur nisi per pares*, &c., yet long usage (h) hath prevailed against it, for the amercement of the nobility is reduced to a certainty, viz., a duke, 10*l.*, an earl 5*l.*, a bishop who hath a barony 5*l.*, &c.

2 Inst. 28; 6 Co. 54; 8 Co. 40 a, S. C. (h) ¶ The amercements were reduced to this certainty by an order of the House of Lords. In former times the earldoms and baronies were affeered by the peers in parliament, and to that end, it is supposed, that estreats of the *misericordiâs* were sent to the clerk of the parliament. Gilb. Exchequer, 81.¶

In an (i) assize, if the plaintiff does not appear, nor any for him, yet three of the assize may be sworn to affeer the amercement, and shall do it.

28 Ass. 26; Ro. Abr. 212. (i) So, upon a nonsuit, after the jury are ready to give

## (II) Of the Manner of recovering Fines, &amp;c.

their verdict, the court may cause the amercement to be immediately affeered by the same jurors. 8 Co. 35 b; 11 Co. 43 b.

In (a) trespass if the defendant, as bailiff, &c., justifies, for that the plaintiff was presented, &c., and sets forth, that the amercement was affeered by two affeerors, he ought to show their (b) names.

Keilw. 66. (a) So, in debt for an amercement, 3 Keb. 362. (b) So, if alleged, that at a court-baron *coram sectatoribus ejusdem Curia*, it was presented, &c., the names of the suitors ought to be shown. 3 Leon. 7, 8; Moore, 75; Bendl. 159.

## (II) Of the Manner of recovering Fines or Amercements.

By the common law, the king or lord may at their election, distrain or bring an action of (c) debt for a fine or amercement.

Cro. Eliz. 581; Savil, 93; Rast. Ent. 151, 553, 606; 2 H. 4, 24 b; 10 H. 6, 7; Raym. 68. (c) And the defendant shall not be allowed to wage his law in any such action, because it is grounded on the action of a court of record. 10 H. 6, 7; Co. Lit. 295; 2 Ro. Abr. 106.

But every avowry or declaration of this kind ought expressly to show that the offence was committed (d) within the jurisdiction of the court; for if it were not, all the proceedings were *coram non judice*, and a court shall not be presumed to have a jurisdiction where it doth not appear to have one.

Hob. 129; Rast. Ent. 553; Co. Ent. 572. (d) But that it need not be alleged in the presentment itself. Hob. 129.—Yet *per* 2 Hawk. P. C. c. 10, § 21, it is most advisable to have such an allegation, and that perhaps may supply the want of the averment of jurisdiction in the pleadings.

Also, it is advisable to allege, that the offence was committed as well as presented, and to show the names of the presentors and the affeerors in setting forth a presentment or affeerment, and also to show that proper notice was given of holding the court.

But for this vide 2 Hawk. P. C. c. 10, § 22, and several authorities there cited.

Of common right, a distress is incident to every fine and amercement in a torn or leet, for offences of common right within the jurisdiction thereof; but, if the offence was only the neglect of a duty created by custom, and of a private nature, it is clear that there must be a custom to warrant a distress, and perhaps such custom is also necessary though the duty be of a public nature.

2 Hawk. P. C. c. 10, § 25, and the authorities there.

Also, the sheriff or lord may for such fines or amercements distrain the goods of the offender, even in the highway, or in land not holden of the lord, unless such land be in the possession of the crown.

Ro. Abr. 670; 2 Inst. 104.

But such fines and amercements being for a personal offence, no stranger's beasts can lawfully be distrained for them, though they have been levant and couchant upon the lands of the offender.

Owen, 146; Noy, 20.

If such court is in the king's hands, the distress may be sold of common right, after it hath been kept for a reasonable time, as the space of sixteen days. And it seems the better opinion, that where any such court is in the hands of a common person, if the goods were distrained for an offence of a public nature, they may be sold of common right, without any special custom for that purpose.

Hetley, 62; Finch, 476; 8 Co. 41; Ro. Rep. 76; Noy, 17; Buls. 53.



No bailiff can lawfully distrain for any such fine or amercement without a special warrant for so doing, which must be set forth by him in an avowry or justification of such a distress.

Cro. Eliz. 698, 748 ; Moore, 574, pl. 789, 607, pl. 839 ; 2 Keb. 745 ; Salk. 107, pl. 2.

## FINES AND RECOVERIES.

A FINE is an agreement of the parties on record, by which lands are transferred from conusor to conusee, with or without a render. This is esteemed a conveyance of greater security than a feoffment, or the investiture by livery, being not only equivalent to the notoriety of livery,<sup>(a)</sup> but having the constant and undoubted credit of a court of record to protect and support it; and this farther convenience and security, that it does not only transfer the right of the vendor, and all claiming under him, but likewise extinguishes the right of others who omit to make their claim in due time.

Spelman describes it thus: *Finis est sollemnis ritus transferendorum prædiorum in Curia Regis civilium causarum, quo nihil sanctius vel augustius ad alienationes et hereditates stabilendas.* Spel. Glos. voc. *Finis*. (*a*) [But this was not on account of the acknowledgment thereof in a court of record, for no such acknowledgment is made in any of the ancient fines; but because lands acquired in this manner were supposed to be recovered by sentence of a court of justice, and the possession was delivered by the sheriff, in pursuance of a writ delivered to him for that purpose. Cruise on Fines, 6.]

Fines seem originally to have been invented and allowed for different ends and purposes than they are now applied to. They were at first no more than a friendly composition and determination of the matters in debate between the demandant and tenant in the lord's court. And this way of composing differences was easily admitted in those days, because the suitors of the court, who were judges of all suits, were by these amicable compositions the sooner dismissed from their attendance at court. Nor did the lord of the manor suffer by them, because on these agreements, the parties litigating paid him a fine for his *congè d'accorder*, as they do the king at this day, which was equivalent to the amercements, which were paid him in adversary suits.

From an observation of the peculiar benefit and security from fines, and from the countenance and encouragement they received from the courts of justice, men began to engage themselves, and oblige each other by covenants to compose their differences. And they were the more easily drawn into this amicable way, because it was not attended with the usual expenses of adversary suits, which, being generally prosecuted with warmth and animosity by the parties litigating, must necessarily involve one or both parties in difficulties, which such friendly compositions are free from; and the judges, considering these agreements as the public acts of the court, allowed them some sanction with their own judgments. Hence they came to be improved into that useful and common assurance which we find them to be at this day, as they stand upon the statutes of 4 H. 7, c. 24, and the 32 H. 8, c. 36.

These fines were not only thought useful to private or particular persons, but such

## (A) Of the several Parts of a Fine, &amp;c.

as established the public peace of the kingdom; and Spelman says, *Fines hujusmodi maxime placuere, quod propter testationis magnificentiam, non solum ad stabiliendas transactiones sed ad rescindendas lites maxime valebant; ideoque ab emptoribus terrarum tanquam sacra anchora culta et admirata.* Spelm. Glos. verb. *Fines*. [Mr Cruise thinks that the idea of a fine was originally taken from the *transactio* of the civilians; and therefore dates their antiquity no higher than the reign of Stephen, or his immediate successor, Henry II. Cruise on Fines, 7, &c.] β In Virginia and Kentucky, the mode of conveyance by fines and common recoveries has never been in common use. Elliott v. Piersol, 1 Pet. 338.g

But for the better understanding of the doctrine of fines, we shall distinguish this head into the following branches, under which the particular cases may be comprehended.

- (A) Of the several Parts of a Fine, and when they begin to operate.
- (B) The several Sorts of Fines.
- (C) Who may levy Fines.
- (D) Of the *Dedimus Potestatum*.
- (E) Of the Operation of a Fine in barring the Issue in Tail.
- (F) Of the Operation of a Fine, in barring Strangers, or those who have but an uncertain Interest, as a Term for Years, or barely an equitable Interest.
- (G) Of the Remedies given to Strangers, by Claim and Entry, for the Preservation of their Right.
- (H) Of erroneous Fines, and the Manner of reversing them.

Of what things a fine may be levied, and by what name, and what shall be a sufficient description of the thing, without naming either vill, hamlet, or parish, see in the next head of *Recoveries*, of what things a recovery may be suffered.

## (A) Of the several Parts of a Fine, and when they begin to operate.

THE first part of a fine is the original writ, and without this the fine is erroneous, and may be reversed for error, in B. R., this being absolutely necessary to bring the parties within the jurisdiction of the court. And though at this day the original is generally a writ of covenant, yet fines are taken on all writs in which lands are demanded, or are to be charged, or which any way relate to them; for the law having provided different remedies for the several grievances of the subject, it was but reasonable in the judges to allow of these compositions, whatever method the injured person took to recover his right.

Co. Reading, 3, 10; Plow. 394; 2 Ro. Abr. 14; 2 Inst. 510; 5 Co. 38. A fine may be levied on a writ of right close, or in any real action, but not in an original in a personal action; and the common writ of covenant, on which a fine is levied, is not a personal, but a real action; for though it is to have damages for breach of covenant, as in personal actions, yet it is to have an execution and performance of the covenants. Salk. 340, resolved *per Curiam*.

The practice now is for the conusor to make the conusance, and acknowledge the fine, before any original sued out. And this has so far obtained, that the judges have resolved such fines should stand, though the conusor died before the writ of covenant was taken out. But in these cases the originals were sued out, and made returnable, as of a term precedent to the conusance, for they are still necessary to make the fine a perfect and complete conveyance, though for the greater expedition this variation from the ancient course has been allowed.

1 H. 7, 9; Hob 329; Farmer's case, 2 Vent. 47. || By a rule of Tr. 30 G. 3, every

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fine at the time of the signing of the judge's *allocatur* thereon, shall have the writ of covenant sued out and annexed thereto. 1 H. Bl. 526.||

If in a *warrantia chartæ* against B, to warrant one acre, he levies a fine of that acre and another, the fine operates to convey only all his right in that acre he was called to defend; for the other was not mentioned in the original.

Co. Reading, 10; 2 Ro. Abr. 16. So, if a writ of covenant be brought *de terris*, and the defendant make consuſance of pasture, meadow, or wood, this fine is not good, nor *e contra*; for these being of a different nature from ploughed land, (which *terra* properly implies,) are contained in the writ, and, consequently, there does not appear to the court any contention about them. 2 Inst. 514; Co. Lit. 4 a; 2 Ro. Abr. 16.

Hence it is, that if the consuſance be of the manor of Dale, the conuſee cannot make a render of the manor of Sale; or if the consuſance be of the third part, the render cannot be of the whole; because the court can determine the right only of that about which the parties contend, and which the conuſee demands in his original. But, if the conuſor acknowledges all his right, &c. to the demandant, for which consuſance he grants and renders the land to the conuſor for life; or if he grants a common in the land, or so many loads of wood off it, this is a good fine; because the determination is wholly of the thing in dispute, one party taking the property, and the other a profit arising from it, and comprehended in the original, for which thing in dispute it was brought.

2 Ro. Abr. 15, 16.

Therefore, if the grant and render had been of a rent *de novo*, that had been good; because the rent issuing out of the land must be implied in a demand of the land; and, consequently, the concord and agreement of the parties is received and allowed for that only which they litigated.

2 Ro. Abr. 15; Co. Reading, 11; 2 Inst. 514. So, if the writ of covenant be of land, he may grant the reversion. 2 Ro. Abr. 16.

As nothing can pass by the fine but what is expressed or implied in the covenant, so no one can take an immediate estate by it, who is not mentioned in the writ of covenant; because none can have any benefit from the judgment of the court that is not judicially before it, and sues for it. Yet a grant and render may be made to a stranger in remainder; but the reason is, because the render being only a consideration for the consuſance, a remainder limited to a stranger may be as much a consideration to the conuſor, as if the whole estate had been given to himself. But there must be an immediate estate given back to the conuſor, because the render *ex vi termini* implies that it must return to him.

Co. Reading, 8; 2 Inst. 514; Bro. tit. *Fines*, III. But, if a writ of covenant be brought against B, who vouches C, the vouchee may make consuſance. 2 Ro. Abr. 13; Bro. 105; 2 Inst. 514.

When the parties are judicially before the court by original, the counsel for the conuſee appears with the *præcipe* and concord, which is in nature of a declaration, setting forth the consuſance which ought to be made by the tenant in the writ, after his appearance is recorded. Then follows his consuſance, which is no more than an acknowledgment, that the manor, or other lands, &c., contained in the writ, belong of right to the demandant, as land which he hath of the gift of the tenant, with a general release and warranty to the conuſee and his heirs. When this consuſance was taken, they went originally to the treasury, but now by the 5 H. 4, c. 14, they stop with the *custos brevium*, who records it; that statute providing, that all the parts of the fine shall remain in the safe custody of the chief clerk of

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the C. B., before the chirographer has been out of court; the design of the act being thereby to prevent the inconvenience which frequently happened by the embezzlement of fines, when they lay only in the hands of the treasurer and chirographer, either by their connivance or negligence.

Co. Reading, 3; 5 H. 4, c. 14; 5 Co. 39 b; 2 Sid. 55.

The next and most material thing considerable in a fine is the king's silver. This is entered on the writ of covenant, and gives it the force and effect of a fine, and is granted to the king *pro licentia concordandi*, or *congé d'accorder*, in compensation of the amercements and other fines, which became due on judgments and nonsuits in adverse suits. This is always paid by him who takes the fee-simple by the fine, and on the entry of it on the covenant, the sum given is expressed, together with the plea, and between whom, with mention of the land for which it is given.

2 Inst. 511; 5 Co. 39. [Formerly the post-fine, or king's silver was paid at the king's silver-office; but it is now paid at the alienation office, by the stat. 32 Geo. 2, c. 14:] || the second section of which enacts, that "no fine, until the same be marked with the sum to which the post-fine amounts in the king's silver-office, shall be effectual in law." And the officer of the king's silver-office or his deputy is restrained from receiving any writ of covenant unless it appear by the mark and endorsement of such receiver, that the post-fine has been paid.]

It is likewise called the post-fine, in respect of the premier fine in the hanaper, which is due to the king on the original, and is greater or less in proportion to that; for it is much as the premier fine, and half as much more; as, if the premier fine be 6s. 8d., this is 10s.

2 Inst. 511.

From the entry of this the fine is obligatory, and begins to operate; and thenceforth the fine shall stand, though either party die before the other parts are recorded. (a) [And though the conusor be an infant, the court cannot stay the passing of the fine; all they can do in such case is, to assign the infant a guardian, with instructions to bring a writ of error to reverse it.]

2 Inst. 511; 5 Co. 39; Dyer, 220; (a) Petty's case, 1 Freem. 78. [When a year and a day has elapsed from the date of the caption, or acknowledgment of a fine, without entering the king's silver, an affidavit must be made, that all those who depart with any interest by the fine are still living, otherwise the king's silver will not be received. And now that the king's silver is paid at the alienation-office, if a year elapses before the fine is carried to the king's silver-office, an affidavit must be made, that the parties were alive when the king's silver was paid. Barnes, 215; Cruise on Fines, 25.]

But, if the conusor dies before the king's silver be entered, the fine is voidable, and may be reversed by writ of error; because this being given *pro licentiâ concordandi*, the agreement of the parties is not to be admitted as the judgment of the court till it be paid and entered, and, consequently, if the conusor dies before that be done, the fine is erroneous, as a judgment given in an adversary suit after the death of one of the litigating parties. But this is to be understood with this distinction, that where it appears by the record itself, that the king's silver was paid after the death of the conusor, there the fine is erroneous; but where after the conusance made the conusor died before the king's silver was paid, and after his death the silver was paid, and entered on a writ of covenant returnable the term precedent his death; as where baron and feme made conusance before commissioners the 26th of March, the feme died the day following, and upon a writ of covenant made returnable the Hilary term precedent, the king's silver was entered as of that term, the fine was adjudged to stand; for where there does not appear an error on the face of the record, the judges, in favour to fines, which so much strengthen men's titles, and quiet their possessions, have

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always supported them, and would not suffer the entering of the king's silver, after the parties' death, to be examined, when it appeared by the record itself that the fine was completed, as a fine of the term precedent the death of the conusor.

3 Mod. 140; 2 Inst. 511; 2 Vent. 47; Hob. 330, Farmer's case; Barnes, 218, Barber v. Nunn.

[The king's silver, it must be remembered, is not payable until the return-day of the writ of covenant; if therefore any of the parties die before that time, the fine will be void.

Wright v. Mayor of Wickham, Cro. Eliz. 484; Okell v. Hodgkinson, 3 Mod. 99; Clements v. Langharne, 2 Ld. Raym. 872; Cookman v. Farrar, Sir T. Raym. 461; Price v. Davis, Comb. 57, 71; Watts v. Birkett, Barnes, 220; 2 Wils. 115, S. S.] || But, if there are several plaintiffs, or several deforciant, and one of the plaintiffs or deforciant dies before the return of the writ, the fine will be erroneous only as against the person so dying.||

The other parts of the fine are the foot and note of it: the foot of the fine runs thus: *Hæc est finalis concordia facta apud Westm. in curiâ domini regis*, &c., and mentions the day, year, and place, and before what justices the conusance was taken.

5 Co. 39; Co. Reading, 3; 2 Bl. Com. 350.

The note of the fine is no more than a docket taken by the chirographer, from which he transcribes the indentures, which are delivered to the party to whom the conusance was made; and when this is done the fine is said to be engrossed.

5 Co. 39; 2 Inst. 468; F. N. B. 147. [A fine may be engrossed at any time after it is levied. 4 Leon. 96; Dy. 254 a.]

A fine was thus: *Hæc est finalis concordia facta incuriâ regis apud Westm. a die sancti Michaelis in tres septiman. anno decimo Willielmi. tertii coram Thom. Trevor, &c., et postea in crast. sanctæ Trinitat. 1 Annæ concess. et recordat. coram ejusdem justiciar.*; so that the concord of the fine was of one term, and the *recordat.* of the term following; and the question was, Of which term this shall be said to be a complete fine? And it was holden to be a fine of the term in which the concord was made, and that the *concordia facta in curia* is the complete fine.

Salk. 341; Lloyd v. Viscount Say and Seal, 10 Mod. 40.

[The chirograph of a fine is evidence to all persons, and in all courts, of such fine; because the chirographer being an officer appointed by the law for the purpose of transcribing fines from the record, his copies must be allowed to be authentic.

Bull. N. P. 229.]

|| There are two petitions of the Commons in the rolls of parliament, 4 H. 4, No. 35, and 5 H. 4, No. 28, stating, that many fines of lands remaining in the king's treasury, and the notes of such fines remaining in the Court of Common Pleas, had been taken away, and other fines and notes of fines counterfeited and put in their places, whereby many persons were disinherited; in consequence of which a statute was immediately passed, 5 H. 4, c. 14, enacting, that all the proceedings on fines, both previous to and at the acknowledgment thereof, should be enrolled of record in the Court of Common Pleas. And by 23 El. c. 3, § 1 & 6, it is enacted, that every writ of covenant and other writ, whereupon any fine shall be levied, the return thereof, the writ of *dedimus potestatem* made for the knowledging of the same fines, the return thereof, the concord, note, and foot of every

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such fine, the proclamations made thereupon, and the king's silver, may, upon the request or election of any person, be enrolled in rolls of parchment; and that the enrollments of the same, or of any part thereof, shall be of as good force and validity in law to all intents, respects, and purposes, for so much of any of them so enrolled, as the same being extant and remaining were or ought by law to be.

1 Cruise, 43; Rot. Parl. vol. iii. 495, 543, 557, 558.

The office of the chirographer of fines was burnt down in the year 1679, whereby, several records of fines, which had been levied in Trinity and Michaelmas terms preceeding, were either burnt or lost. In consequence of this an act was passed, 31 Car. 2, c. 3, reciting, that the fines so burnt or lost had duly passed all the offices, so that by the records of the king's silver, the notes of the cursitor who made out the writ of covenant, and the entries thereof at the office of alienation, and by the book of entries of fines kept by the chirographer's deputy, &c., the full contents of all such fines would appear; but for the want of the records of the fines so burnt or lost, purchasers and others, whose titles were secured under the said fines, were in danger of having the same impeached; and therefore enacting, that the said chirographer or his deputy should, before the end of the next Trinity term, upon oath certify to the justice of the Court of Common Pleas, a note of all such fines entered into the said book kept by the said deputy, as he, upon diligent search, should find were burnt or lost by reason of the said fire; which certificate should be in parchment, fairly written, and a copy thereof, set up in Westminster hall, &c., and that any time within three years the chief justice of the said Court of Common Pleas, together with any one or more of the justices of the said court, should have power to send for any officer's books, records, &c., and upon full examination of any such fine, the records whereof were either burnt or lost, should direct the said chirographer or his deputy to new engross the note and foot of such fine without fee, and to carry the same before the said chief justice, and such other of the said justices as shall have taken the examination concerning the burning or loss of such fine, who were required to sign their names at the bottom of the said note and foot; and every such fine whereof the record shall be so new-engrossed, should be of the same force and effect as if it had still remained upon record unconsumed or not lost.

1 Cruise, 44.

By a rule, Tr. 52 G. 3, (June 19th, 1813,) it is ordered, that "thenceforth all fines shall be left at the office of the chirographer within fourteen days after the same shall have passed the king's silver-office; and that all fines then remaining in the king's silver-office should be carried to the chirographer's office, within two months from that day, and that a neglect to comply with this rule shall be deemed a contempt of court."

4 Taunt. 600.

If the attorney employed to levy a fine mislays the papers, and does not complete it within the time required by the above rule, the court will not permit the fine to be afterwards perfected, but, if all the parties are alive, will direct a new fine to be levied at the expense of the attorney.

Stone v. Stone, 4 Taunt. 601; Lindo v. —, 5 Taunt. 305, S. P.

By a rule E. 36 G. 3, no fine which appears to have been acknowledged more than twelve months, can pass the king's silver-office without a rule of court or judges' order; in which case, if the conusors be living, an affidavit

(A) Of the several Parts of a Fine, &c.

must be made thereof; and if dead, there must be an affidavit of the time of their death. And the application for a rule or order, that the fine may pass the king's silver-office, must be made to the court on motion, if in term-time; if in vacation, to a judge at chambers; and the rule or order must be filed with the *præcipe* and concord at the king's silver-office.

1 B. & P. 530.

The courts being now in the habit of requiring that a copy of the *præcipe* and concord signed by the parties shall be left with the chief justice, the fine may pass upon such copy, in case the original should be lost.

Ellis v. Johnson, 6 Taunt. 231.

By 27 E. 1, c. 1, the notes of all fines shall be read openly and solemnly in the Court of Common Pleas, and in the meantime all pleas shall cease; and this on two certain days of the week, according to the discretion of the justices.

By 4 H. 7, c. 24, § 1, "After the engrossing of every fine it shall be openly and solemnly read and proclaimed in the same court, in the same term, and in three terms then next following the same engrossing in the same court, at four several days in every term; (a) and in the same time that it is so read and proclaimed all pleas do cease."

(a) By st. 31 El. c. 2, the proclamations are reduced to four; that is, once in the term in which they are engrossed, and once in every of the three terms next after the same engrossing.

Since the making of this act, the proclamations are endorsed on the foot of the fine, and considered as matters of record.

1 Cruise, 53.

The statute having, as we have seen, ordained that the proclamations shall be made *the same term that the fine is engrossed, and the three terms then next following*, if one of those three terms had been adjourned, the proclamations had been ineffectual in the whole, and it could not be supplied after the last term by the exposition of the words, or the equity of the statute; to remedy which the statute of 1 M. c. 7, § 2, was passed, enacting, that, "all fines, whereupon the proclamations should not, by reason of adjournment of any term by writ, be duly made, should be of good force, effect, and strength, to all intents, constructions, and purposes, as if the term so adjourned (b) had been holden and kept from the beginning to the end thereof not adjourned, and proclamations therein made according to the form and effect of the statute."

Plowd. 371. (b) Though only part of the term be adjourned, it is within this act, which is a favourable law, and to be taken by equity. Dy. 186 a; 2 Inst. 519.

Since the statute of 4 H. 7, fines have been distinguished into fines at common law, and fines with proclamations; and it is in the election of the person levying the fine to have it proclaimed or not; the proclamations being distinct from and superadded to the fine.

3 Co. 86 b; Cr. El. 692; Dy. 216 a; 1 Bulstr. 206.

When a fine with proclamations is given in evidence, the proclamations must be examined by the roll, because the chirographer is not appointed by the statute to copy the proclamations, as he is to copy the concord.

Bull. N. P. 229; 6 Taunt. 486.

A fine with proclamations is a fine at common law, with the addition of the proclamations; if then there be error in the proclamations, that error will not affect the fine; it still stands as a fine at common law;

## (B) The several Sorts of Fines.

but, if there be error in the fine, the whole is gone: for the fine is the principal, and the proclamations are only to give it notoriety.

By 23 El. c. 3, § 6, "the chirographer shall every term write out a table of the fines levied in each county in that term, and shall affix it in some open part of the Court of Common Pleas all the next term; and shall also deliver the contents of each table to the sheriff of each county, who shall at the next assizes affix the same in some open part of the court."||

## (B) The several Sorts of Fines.

ALL fines are either executed, as fines *sur conusance de droit come ceo*, &c., unless *sur release*, and fines *sur surrender*; or executory; as fines *sur conusance de droit tantum*, and *sur grant et render*. (a) The fine *sur conusance de droit tantum* seems to be the most ancient; for the conusance being in the place of the judgment, which was always executory in adversary suits, the demandant was obliged to follow the rules of the law, and sue out execution. (b) But in time, when these fines became the common and best way of purchasing, the purchaser, to prevent the trouble of suing out execution, had seisin given him by livery in the country, and for his farther assurance obliged the vendor, by covenant, to levy a fine; and thus the fine *sur conusance de droit come ceo*, &c., came in use, which supposes a precedent gift, by which the conusee was put into possession, and consequently, there needs no execution of what he had already.

Co. Reading, 4. (a) [This fine is executed as to the first part, and executory as to the second; for if the first part was not executed, it would be void, as the cognisee can have nothing to render to the cognisor till he is in possession. Cruise on Fines, 73. (b) If the party to whom the estate was limited by a fine executory was in possession at the time when such a fine was levied, he need not sue out a writ of *habere facias seisinam*; for in that case the fine would enure by way of extinguishment. Touchst. 4. So, if a fine executory was levied of a reversion depending on an estate for life, or years, or of a seignory, or any thing which lay in grant, they would pass immediately, because it would be impossible to give actual possession of them. 1 Co. 97 a.]

This fine *come ceo*, &c., is most commonly used, being the surest for the purchaser. In which it is to be observed, that this fine and that *de droit tantum*, convey a fee-simple to the conusee, without words of inheritance; for when the conusor acknowledges the land to be the right of the conusee, it is repugnant and contradictory to his own acknowledgment to claim any right or interest in the land in reversion or remainder. Besides, in every judgment a fee-simple was recovered, and the conusance coming in lieu of the judgment, must necessarily import as much, unless the express acknowledgment of the parties (c) qualify it.

Co. Lit. 9 b; Co. Reading, 4, 7. [This species of fine hath been called a feoffment of record; but this expression is by no means accurate; for there are cases in which a feoffment hath a more extensive operation than a fine; Co. Lit. 50; 1 Salk. 339; 3 Atk. 141; and therefore Sir W. Blackstone hath said, that it might, with more accuracy, be called an acknowledgment of a feoffment on record. 2 Bl. Com. 348. But this, perhaps, is not making a very substantial distinction. 2 Wooddes. 309.] (c) And therefore if the limitation be expressly to the conusee, and the heirs of his body, the fine passes only an estate-tail; for it would be absurd to give more against so solemn a declaration of the parties. Co. Reading, 4; 1 Salk. 340.

Upon a fine *sur conusance de droit come ceo*, &c., the conusor cannot reserve a rent, because the conusance supposing a precedent gift, he cannot charge the inheritance which he has given entirely away; and so the *reddendum* comes too late when the fine has mentioned before an absolute gift, without any such clause of reservation.

Bro. tit. *Fines*, 30; 2 Ro. Abr. 18. But, if the conusance be only of an estate for



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life, the conusor may reserve a rent, with clause of distress; for that is a remedy the law gives for the recovery of all rent services, which this must be, being incident to the reversion. Co. Reading, 5; 2 Ro. Abr. 18.

A fine *sur conusance de droit come ceo*, &c., cannot be levied to two and their heirs; for the end of fines being to settle the possession, not only for the present, but for ever, the admittance of such a fine would not answer the end. For, besides the uncertainty which of the conusees may survive and enjoy the land, the fine itself cannot operate according to the limitation; for the survivor, by the privilege of jointenancy, shall enjoy the whole, and for ever exclude the heirs of the other conusee. Besides, the fine being equivalent to a judgment, ought to decide and settle the right of the fee.

Ro. Abr. 19; Co. Reading, 5, 9. The same law is against the grant of a reversion. Bro. tit. *Fines*, 65. But, if lands by fine be granted to two and the heirs of one of them, this is good; for all things will continue as the fine has settled them. Bro. tit. *Fines*, 65. || As to lands of the tenure of gavelkind, the judges allow them to be limited to two and their heirs. Rob. Gavelk. 132. But there seems to be no reason for allowing this limitation in a fine of lands of that tenure, which does not equally apply to other lands. See Mr. Preston's *Conveyance*, vol. i. 287, 288. Accordingly, a fine, though levied to two and their heirs, will be allowed to be of force. 2 Mod. 49. ||

For the former reason the judges will not, or at least ought not to, admit of a fine upon condition; because such a fine does not positively determine and settle the right of the fee, it being uncertain whether the conusee will enjoy the land according to the fine, since that depends upon the performance or non-performance of the condition. But my Lord Coke tells us, that if such fines be admitted by the judges they are valid, and shall stand the rule, *quod fieri non debet, factum valet*, obtaining in this case; because fines being the private agreement and concord of the parties, it were to trifle with the authority of the king's courts, which ever ought to be preserved sacred, to suffer either party to recede from his contract, after their solemn composition acknowledged on record, and received in the most solemn manner by the judgment and decision of a court of justice.

5 Co. 38 b, Tey's case; 2 Ro. Abr. 18; Bro. tit. *Fines*, 5; Co. Reading, 5

A makes a lease for life, and afterwards grants the reversion to B for life, the remainder in tail by fine; in a *quid juris clamat* brought by the grantee for life against the lessee, he would have surrendered by fine to the conusee, reserving a rent during his life, but the court refused it; for had this surrender, with the reservation of the rent, been admitted, it might have happened that the rent would not continue according to the limitation of the fine; for if the grantee of the reversion died before the tenant for life, the remainder-man in tail should hold the land discharged, and the tenant for life could not enjoy the rent as long as the fine gave it. But, if in this case the lessee had surrendered to the grantee for his own life, with a reservation of a rent, this might have been admitted; for this is no absolute surrender, and each party may enjoy what the fine gave him, according to the several limitations thereof.

Co. Reading, 3, cites 19 E. 3. *Qu.* for there is no report of that year.

If there be lessee for life, the remainder for life, and the lessee levy a fine *sur conusance de droit tantum* to him in remainder, this enures by way of (a) surrender, because by this fine he only acknowledges all the right he has in the land to belong to him in remainder. But, if the lessee had levied a fine *sur conusance de droit come ceo*, &c. to him in remainder, it had been a forfeiture of both their estates, and he in reversion might enter immediately. And the reason of the difference is this: the fine *sur conusance de droit*

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*come ceo*, &c. always grasps a fee-simple, which passes by the precedent gift as the fine supposes; but the fine *sur conusance de droit tantum* only conveys all his right, which is intended all he can lawfully pass away.

Co. Reading, 5. (a) Note, the forms of these fines *sur grant et render* are the same with those *sur conusance de droit*, only the clause of warranty is omitted.

Where C was seised in fee as heir of the part of the mother, and he and his wife levied a fine to A and B with warranty, and A and B, by the same fine, granted and rendered to the husband and wife in tail, remainder to the heirs of the husband; though it was urged, that the seisin of the conusee was fictitious, and that nothing was altered by the fine, yet resolved, that the conusee was more than a bare instrument, and that the estate was once in him; and that the fine and render is a conveyance at common law, and the render makes the conusor a new purchaser, as much as a feoffment and re-infeoffment at common law.

Price v. Langford, 1 Salk. 337; 2 Show. 92, S. C.; Carth. 140, S. C., by the name of Rice v. Langford; Com. Dig. tit. *Discent*, (C. 7.) S. C.

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AND here it must be first observed, that whatever legal defects may be in the conusor, if the judge admits his conusance, the fine shall stand in all cases, except that of an infant, though the judge omits a very necessary part of his duty in not rejecting such fines.

Co. Reading, 8; 2 Inst. 515.

The principal defects are either want of discretion and understanding, as in infants, idiots, and persons of *non sane* memory; or want of power, as *femes covert*.

Co. Reading, 8. But for this vide the several titles of *Infants*, *Idiots*, and *Baron and Feme*.

As to fines levied by an infant, though strictly speaking all contracts made by infants are in their own nature void, because a contract is an act of the understanding, which, during their state of infancy, they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power to recede from and vacate it when it may prove prejudicial to them. Now the method to set aside such a contract must be by matter of equal notoriety with the manner in which it was made; and therefore if an infant levies a fine, which is no more than his own agreement recorded as the judgment of the court, he must reverse it by writ of error; and this must be brought during his minority, that the court of B. R. may by inspection determine the age of the infant. But the judges by *adjuncta* may in such cases inform themselves, as, by witnesses, church-books, &c.

Vide *Postea*, letter (II), &c., Co. Lit. 380 b; Moore, 76; 2 Ro. Abr. 15; Bro. tit. *Error*, 60; Bro. tit. *Fines*, 74, 79; 2 Inst. 482; 2 Bulst. 320; 12 Co. 1, 22; Willes, 161. If an infant brings a writ of error to reverse a fine for his nonage, and, after inspection and proof of infancy by witnesses, dies before the fine is reversed, his heir may reverse it, because the court, having recorded the nonage of the conusor, ought to vacate his contract when he appeared to be under a manifest disability at the time he entered into it. Co. Lit. 380 b; Moore, 884. An infant acknowledged a fine, and the conusees omitting to have the fine engrossed till he came of age, in order to prevent the infant from bringing a writ of error, the court, upon view of the conusance produced by the infant, and upon his prayer to be inspected, and his age examined, recorded his nonage to give him the benefit of his writ of error, which he must otherwise lose, his nonage determining before the next term. *Sarah Griffith's case*, 12 Mod. 444.

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As to idiots and lunatics, it is necessary to distinguish between their acts done *in pais* and those solemnly acknowledged on record; though the law is clear, that in neither case are they admitted to disable themselves, for the insecurity that may arise in contracts from counterfeit madness and folly. But their heirs and executors may avoid such acts *in pais* by pleading the disability; because if they can prove it, it must be presumed real, since nobody can be thought to counterfeit it, when he can expect no benefit from it himself.

4 Co. 124, Beverley's case; Co. Lit. 247; Bro. tit. *Fail*, 62; Cro. Eliz. 398, 622; F. N. B. 202. But in what case they themselves may have relief in equity, vide tit. *Idiots and Lunatics*.

But neither the lunatic himself, nor his heir, can vacate any act of his done in a court of record; and therefore if a person *non compos* acknowledges a fine, it shall stand against him and his heirs. For though the judges ought not to admit a fine from a man under that disability, yet when it is once received, it shall never be reversed, because the record and judgment of the court, being the highest evidence in the law, the consor is presumed to be, at the time, capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of it.

4 Co. 124; 2 Inst. 483; Bro. tit. *Fines*, 75; Co. Lit. 247. Idiocy to be judged of by the justices, on fine levied. 15 Ed. 2. \*

So it is in the case of a fine levied by an idiot, it shall stand against him and his heirs; for no averment of idiocy can vacate the fine, nor will an office finding him an idiot *a nativitate* be sufficient to reverse the fine; for that were to lessen the credit of judgments in courts of record, by trying them by other rules than themselves.

2 And. 193; Hugh Lewis's case, 4 Co. 124 a, 126 b; Bro. tit. *Fines*, 75; Co. Lit. 247. || But in cases of this sort, equity has relieved by decreeing a reconveyance. Addison v. Dawson, 2 Vern. 678. It has also relieved against a fine levied upon a possession obtained under a forged deed. Cartwright v. Pulmey, 2 Atk. 381. Though a fine has been levied, yet if it is under circumstances of fraud, the court, said Lord Hardwicke, ought to prevent the stealing away an estate in this manner. Baker v. Pritchard, alias Hosier. Ibid. 388.||

And as fines ought not to be taken from lunatics and idiots, so neither from old dotting men who have lost the use of their reason. But, if they be weak or infirm through age and sickness, that will be no sufficient cause to refuse them.

West. Fines, § 4.

As to feme coverts, from the intermarriage, the law looks upon the husband and wife but as one person, and allows of but one will between them, which is placed in the husband as the fittest and ablest to provide for and govern the family, and therefore gives him an absolute power over her chattels personal, to dispose of as he pleases, without her consent. But as to her real estate, it has thought fit that no act of his shall prejudice her or her heirs in it, unless she join with him by some matter of record, and on examination testify her assent to such disposition.

10 Co. 42 b, 43 a; 2 Inst. 510; Sid. 11; Ro. Abr. 347; but those books which say, that a fine shall not bind a woman under coverture, unless she be examined, *must* not be understood as if it were in her power to reverse the fine for want of her examination; but they are to be understood in this sense, that the judge ought not to receive a fine from a feme covert without examining her, lest it should not proceed from her own freedom and choice. But, if such a fine be once admitted, and recorded without any examination, though the judge has omitted a very necessary part of the duty, yet

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the fine shall stand, and neither the feme, nor her heirs, shall be admitted to aver that she was not examined; for that were to lessen the credit of the judgment of the courts of justice, which is the highest evidence of the law. But of fines levied by the husband solely, or by the husband and wife jointly, of the wife's inheritance, or of fines levied by the wife solely, of lands which are of the provision of the husband, vide tit. *Baron and Feme*, (1), and the statutes of 11 H. 7, c. 20, and 32 H. 8, c. 28, and c. 36.

|| Duress of imprisonment, or the like, cannot be alleged at law as an answer to the operation of a fine.

Touchst. 6; 2 Inst. 483.||

[No person can levy a fine of lands that will affect strangers, unless he has at least an estate of freehold in them, either by right or by wrong; for otherwise it might be in the power of any two strangers to deprive a third person of his estate, by levying a fine of it, so that in every case where a fine is levied, and none of the parties to such fine have any estate of freehold in the lands whereof the fine is levied, it will only bind the parties themselves, and their heirs, but may at any time be set aside by the real owner, by pleading that neither of the parties had an estate of freehold in the lands at the time when the fine was levied.

Touchst. 14; West. Symb. p. 2, § 13.

Hence, therefore, if a person who is only possessed of lands for a term of years, or who holds them by a statute merchant, statute staple, or writ of *elegit*, or is tenant at will, levies a fine, it will have no effect whatever as to strangers.

3 Co. 77 b.

Upon the same principal, says Mr. Cruise, a fine levied before entry or receipt of rent will be void. (a) So, if a fine be levied by a copyholder of his copyhold, (b) because the freehold is in the lord.

1 Cruise, 106; Lord Townsend v. Ash, 3 Atk. 336. (a) || This observation, says Mr. Preston, in the first volume of his Conveyancing, p. 263, must be understood with the qualification, that the freehold is in some other person. A fine by a person who has a seisin in point of fact, as by actual possession; or in law, as an heir on the death of his ancestor, and before any abatement by a stranger, Cro. El. 639; or by construction of law, as a person who is entitled to the reversion or remainder expectant on an estate in the possession of his tenant, or of a person connected with him in privity of estate, may levy a fine with effect. In all these instances, the freehold is in the person levying the fine, and the plea of *partes finis nihil*, &c., will be irrelevant. In Lord Townsend v. Ash, the persons who insisted on the efficacy of the fine, were persons who had a *defeasible* title under an estate gained by adverse possession. They had levied a fine, but having levied the fine before they had any seisin in fact or in law, the fine did not avail them. || (b) Co. Cop. § 55. || That a termor, or a copyholder, may, by means of a fine, acquire the fee by non-claim, a feoffment should be made to gain the freehold, and the fine be levied at a subsequent period. (Co. Cop. § 55. Margaret Podger's case, 9 Co. 104; Focus v. Salisbury, Hardr. 401;) and as of a term *subsequent* to, and not preceding the feoffment, and so that it may appear from the record that the fine was preceded in date (measured by the return of the writ) by the date of the feoffment. When a fine is preceded by a feoffment it will be free from the objection, that *partes finis nihil habuerunt*; for the estate of freehold is acquired by the forcible operation of the livery of seisin. 1 Prest. Conveyanc. 269.||

But a person having a defeasible right only to lands, may, notwithstanding, levy a fine of them, which cannot be set aside by the plea that neither of the parties had an estate of freehold in the lands.

Carter v. Barnardiston, 1 P. Wms. 505.

So a *cestuy que trust* may levy a fine of his trust estate, although he is only tenant at will to his trustees; for it is now settled in equity, that any legal conveyance or assurance by the *cestuy que trust*, shall have the same effect on the trust estate, as it would have had on the legal estate, if the

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trustees had conveyed it to the *cestuy que trust*. If it were not so, trustees, by refusing, or by not being capable of executing their trust, might prevent a *cestuy que trust* tenant in tail from exercising the power given him by the law over his estate, which would tend to the introduction of perpetuities.

1 Ch. Ca. 213; Ca. Temp. Talb. 43.

So, a fine levied by a vouchee to the demandant, or a fine from the demandant to the vouchee, will be good; because in law the vouchee is supposed to be tenant of the land, though in fact he never is so at present.

3 Co. 29 b.

An alien, not being capable of holding lands, ought not to be permitted to levy a fine; but, if he does levy a fine, it will not conclude the king after office found.

13 Vin. Abr. 228. || The court will not permit a fine to be levied in which it appears that the consor is an alien enemy. *Cruttenden v. Bourbell*, 1 Taunt. 144. ||

Corporations aggregate cannot levy fines; because, as they are invisible, they can only appear by attorney; whereas the statute *de modo levandi fines* requires that the parties to a fine shall appear personally before the judges. But Sir Edward Coke saith, that a sole corporation may acknowledge a fine.

Co. Read. 7.

By the statutes 11 H. 7, c. 20, and 32 H. 8, c. 28, woman seised of jointures or estate-tail of the gift of their husbands, and husbands seised *jure uxoris* are prohibited from levying fines of such estates. And the disabling statutes, which prevent ecclesiastics from alienating their churchlands for any longer time than three lives, or twenty-one years, by necessary implication prohibit them from levying fines.

Persons outlawed, or waived in personal actions, may alien by fine, for their estates still remain in them, although they have forfeited the rents and profits.

West. Symb. p. 2, § 13.

A person who hath committed murder may, it seems, before conviction, levy a fine, if the deed to lead the uses be prior to the time of committing the offence.

*Stevens v. Winning*, 2 Wils. 219.]

|| Tenants in common, coparceners, and jointenants, having an ownership only in their aliquot parts, the operation of a fine by them will be confined to their respective shares. Though jointenants are seised *per my et per tout*, a fine levied by a jointenant of the entirety will be good only for a moiety: but it will sever the jointenancy.

1 Prest. Conv. 264; 1 Cruise, 104; 6 Mod. 45.

But when one jointenant, tenant in common, or coparcener disseises his companion, and by that means acquires a sole seisin, the fine will operate to the extent of the share acquired by disseisin, as well as the original share.

*Fairelaim v. Shackleton*, 5 Burr. 2604; *Doe v. Prosser*, Cowp. 217. ||

|| Where the estate of a married woman has been regularly sold with the consent of her husband, the conveyance executed by him and the purchase-money paid, the Court of Common Pleas will not prevent the wife from levying a fine because her husband has since become *non compos*.

*Stead v. Izard*, 1 New R. 312; and see *Ex parte George*, 8 Taunt. 590.

(C) Who may levy Fines.

If one of two tenants in common of a reversion, levy a fine of the whole, such fine does not require an actual entry by the other tenant in common to avoid it.

Roe dem. Truseott v. Elliott, 1 Barn. & A. 85.

Devise to trustees in fee in trust to permit A H to receive the rents and profits for life, remainder to W H in tail, remainder to J S in fee; held, that a fine with proclamations levied by W H to a stranger in the lifetime of A H was void, and therefore the heir of J S was not barred by non-claim and writ of entry.

Hall v. Doe, 5 Barn. & A. 687; and see Doe v. Perkins, 3 Maule & S. 271; Doe v. Harris, 5 Maule & S. 326.

Where a husband and wife granted to trustees an estate, of which the wife's father was seised in fee-simple; and afterwards, in the life of the father, they levied a fine of lands to the uses of the settlement, and the father afterwards died, leaving the wife one of the coheiresses; held, that her moiety of the estate became subject to the uses of that settlement by reason of the fine as an estoppel against the husband and wife and all persons claiming title under them.

Helps v. Hereford, 2 Barn. & A. 242.

By marriage settlement certain manors and lands were limited to the husband for life; remainder to the wife for life, remainder to the use of the first and other sons of the marriage successively in tail-male, remainder in case the wife should survive the husband to her in fee; but if she should die in the lifetime of the husband, remainder to the daughters successively in tail-male, remainder to the use of such persons related by blood or consanguinity, and in such estates and interests, and in such manner, and charged with such sums of money in favour of such persons so related as she by her will might appoint, and in case of no such appointment to her in fee. The settlement also contained a power for the trustees there named at the request and by the direction of the husband and wife of the survivor, to sell or exchange the settled estates, and for that purpose to revoke all or any of the uses contained in the settlement; and also a covenant by the husband for further assurance on his part and of his wife, and all persons claiming under him. In pursuance of this settlement certain fines were levied. By deed, dated March, 1807, reciting the settlement and the fines levied in pursuance of it, and the limitations therein contained; and further, that the wife was desirous of acquiring an absolute power of appointment over the manors, &c., comprised in the settlement, in the event of her surviving, or dying in the lifetime of the husband; and there being a general failure of issue of her body inheritable to the manors, &c., under the settlement, the husband and wife covenanted to levy fines *sur conusance de droit come ceo*, &c., with proclamations to J G and his heirs, of all the manors comprised in the settlement, which fines were to operate and to be taken to operate, first, for corroborating the uses contained in the settlement antecedently to the limitations to the use of the wife in fee-simple, and subject thereto to the use of such persons, &c., as the wife by will or deed might appoint. In pursuance of this latter deed, several fines *come ceo* were levied by the husband and wife; held, that under these circumstances these latter fines did not operate to extinguish, destroy, or suspend the right or power of the husband and wife, and the survivor of them to request and direct a sale or exchange of the settled

(D) Of the *Dedimus Potestatem*.

estates under the powers for that purpose contained in the settlement, so as to prevent an exercise of those powers by the trustees.

Earl of Jersey v. Deane, 5 Barn. & A. 569; and see Tyrrell v. Marsh, 3 Bing. 31.]]

(D) Of the *Dedimus Potestatem*.

THE statute (a) of 15 E. 2, called the statute of Carlisle, introduced the *dedimus*, which is a special commission, granted out of Chancery, to certain persons therein named, to take the conusance of such persons as through age or sickness are not able to appear in court in person.

By this statute nobody can be a commissioner but the judges, and two or one of them, by the consent of the rest, may receive the conusance; and if there go but one of them, he shall take with him an abbot, a prior, or a knight, a man of good fame and credit; and writs of error have been allowed to reverse fines where the conusance hath not been taken before such persons. Bro. tit. *Fines*, 120; F. N. B. 146. But the present practice falls short of the order this statute prescribes, and it is sufficient if one of the commissioners be a knight, Reg. Pash. 43; El. Wils. 78; or though neither be a knight, if one of the judges of the C. B. gives his *allocatur* to the caption, by which great abuses have happened in the taking of fines. (a) [This statute, as it is called, is not properly a legislative act, but is merely a writ directed to the justices of the bench, for their government in taking the acknowledgment of fines. 2 Reeves, 304.]

By the custom, the chief justice of C. B. may take conusances any where out of court, and certify the same without any *dedimus*; and if a sergeant hath a patent to be C. J., he may take conusances without a *dedimus* before he is sworn.

1 H. 7, 9 a; Co. Reading, 10; Cro. Eliz. 469; 2 Inst. 512.

[So by custom, the judges of assize may, in their circuits, take the acknowledgment of fines without any writ of *dedimus potestatem*, on account of the great confidence which the law placeth in their judgment and integrity. In such cases, however, a writ of *dedimus potestatem* ought to be sued out, bearing date before the acknowledgment of the fine; although, if the writ of *dedimus potestatem* is tested after the date of the acknowledgment, still the fine will be supported.

Jenk. 227; Dyer, 224 b; Cro. El. 275.] || See Rot. Parl. No. 16, vol. ii. p. 261, a petition from the commons beyond Trent, praying that a justice of one or the other bench should come twice in every year into their counties to take the acknowledgment of fines.]]

If a fine be levied to one of the justices of C. B., and the said justice take the conusance of the fine, it is void, *quia judex in propriâ causâ*.

Co. Reading, 10.

If the *dedimus* be directed to two jointly, and the conusance be taken by one only, the fine is erroneous; for where two are invested with a joint power, it cannot by any construction from the commission be executed by one only.

Cro. Eliz. 240, Downes v. Savage.

The *dedimus* contains the substance of the writ of covenant, and therefore must bear *teste* after it, otherwise it is error; and must be signed by the lord keeper or chief justice, or by some of the justices of the circuit where the lands lie.

F. N. B. 146; Cro. Eliz. 677, 740; Co. Reading, 10; Bro. tit. *Fines*, 116; Ro. Abr. 794; Dyer, 220.

If the commissioners refuse to certify the conusance to the court in convenient time, (b) which is a year and a day, a *certiorari* is to be awarded against them, reciting the substance of the *dedimus*, and that they have

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taken the conusance, and commanding them to certify it; and in case of refusal to do it, an *alias*, a *pluries* and attachment will issue against them.

F. N. B. 142. (b) [They are required by stat. 23 El. c. 23, § 5, to certify the acknowledgment of the fine within twelve months after it is taken, and also to certify the year and day whereon it was acknowledged.]

If the commissioners die before the conusance be certified, their executors must certify it upon *certiorari* to them directed, and upon their refusal like process lies, as in the former case.

Co. Reading, 10; F. N. B. 147.

If a *dedimus* be awarded to take the conusance of three several persons, the commissioners may take the conusance from each of them, and at several times, for it may so happen that they cannot meet at one place at the same time; and if the commissioners return the conusance but of two of them, the court may erase the name of the third out of the *dedimus*, and make the writ of covenant agreeable to it; for since the third does not join, it can be no prejudice to him, and therefore it were unreasonable that his obstinacy or refusal should impeach the conusance of others duly taken, and so prevent their amicable composition of their differences.

Cro. Eliz. 576, 577; 3 B. & P. 366.

A *dedimus* was awarded to take the conusance of a fine from baron and feme, and the feme refusing to join, the conusance of the husband was only returned; in this case the court ordered a new *dedimus* to be awarded, but to be of the same date with the former, and that the return of the commissioners should be annexed thereunto; for the refusal of any one of the conusors can be no reason to delay or hinder another to transfer his right.

Cro. Eliz. 576, 577.

|| But, where under a *dedimus* to take the acknowledgment of nine persons, the commissioners took the acknowledgment of six on one piece of parchment, and of three on another, the court would not permit the fine to pass.

Baleh v. Phelps, 3 B. & P. 366.||

[As the writ of *dedimus potestatem* recites, that a writ of covenant is depending between the parties, it should bear date after the writ of covenant; else it will be error. But, (a) if it be tested on the same day with it, the fine will be valid.

Touchst. 5; Co. Read. 9; 1 Ro. Rep. 223; Cro. El. 740; 1 Ro. Abr. 794. (a) Cro. Eliz. 677; Cro. Ja. 11; 5 Co. 47 b.

By a rule of the Court of Common Pleas made in H. 13 Geo. 1, it was directed, that no fine acknowledged before commissioners should be allowed to pass, unless some person, who was present when the fine was acknowledged, should appear personally before the lord chief justice of the court, and be examined upon oath touching the execution thereof.

Wilson, 82. Vide Dean v. Tidmarsh, Barnes, 143.

This rule having been found by experience to be attended with inconveniences, and not having answered the good purposes for which it was intended, the court made the following rules:

H. 17 Geo. 2, "It is ordered, That instead of an oath made *viva voce* of the due acknowledgment of fines, an affidavit in writing on parchment shall be made and annexed to every fine, in which the person making the same shall swear that he knew the parties acknowledging such fine; that the same was duly signed and acknowledged; that the party or parties acknowledg-



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ing, and also the commissioners taking the same, were of full age and competent understanding ; that the feme coverts (if any) were solely and separately examined apart from their husbands, and freely and voluntarily consented to acknowledge the same ; and that the cognisor or cognisors, and every of them, knew the same to be a fine to pass his or their estate or estates ; which fine, together with such affidavit annexed, shall be transmitted to the lord chief justice, or some other justice of this court for his *allocatur* thereon, and such affidavit shall remain annexed to such fine, and be left with the same in the proper office. And it is ordered, That every such affidavit, except where the persons, at the time of their acknowledging the fine, are in Ireland, or some other parts beyond the seas, shall be made by some attorney of the courts of Westminster hall."

Wilson, 85.

H. 26, 27 Geo. 2, "It is ordered, That in the affidavits made in pursuance of the preceding rule, the person or persons so making the same shall swear that the fine was duly signed and acknowledged upon the day and year mentioned in the caption ; and, if there be any rasure or interlineation in the body or caption of such fine, that such rasure or interlineation was made before the party or parties signed the said fine, and before the caption was signed by the commissioners."

Wilson, 89.

These rules have in some instances been dispensed with, and (a) particularly where fines have been acknowledged out of the kingdom.] || But with respect to such fines, it is ordered by a rule of court, (H. 14 G. 3,) relative to recoveries suffered by persons abroad, which has always been holden to extend to the case of fines, that "if the party or parties shall be in Ireland, or in any other parts beyond the seas, then the affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgment of such warrant or warrants of attorney, and shall be sworn, either before some person duly authorized to take affidavits in this court, or before some magistrate of the place where such acknowledgment shall be taken, having authority to administer an oath, and in the presence of a public notary ; which notary shall also certify in writing under his hand and seal, as well the due administering of the said oath, as also the name, signature, and office of the magistrate administering the same."

Say v. Smith, Barnes, 217. (a) Fleetwood v. Calenda, Ibid. 219 ; Heathcock v. Hanbury, Ibid. 217 ; Seton v. Sinclair, 2 Bl. Rep. 880.

A strict observance of this rule will not be dispensed with, but upon an affidavit of the special circumstances, which may take the case out of it.

Crittenden v. Bourbell, 1 Taunt. 144 ; Ruding v. Manning, 2 Taunt. 313 ; Price v. Williams, 4 Taunt. 573.]

[By the statute 34 & 35 Hen. 8, c. 26, § 40, it is enacted, That fines shall and may be taken before the justices of Wales, of lands, tenements, and hereditaments, situated within their jurisdiction, by force of their general commission, without any writ of *dedimus potestatem* to be sued for the same, in like manner and form as is used to be taken before the king's chief justice of his Common Pleas in England.]

(E) Of the Operation of a Fine in barring the Issue in Tail.

By the 4 H. 7, c. 24, a fine with proclamations shall conclude all persons, both privies and strangers, except women covert, persons under age, in

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prison, out of the realm, or of *non sane* memory, being not parties to the fine; by which general clause all others are bound. But by the first saving,

4 H. 7, c. 24.

The right and interest that any person or persons (other than parties) hath or have at the time of the fine engrossed, is saved; so that they or their heirs pursue such their right or interest by action, or lawful entry, within five years after the proclamations so made. This clause seems to comprehend only those who have present right. But by the second saving,

The right and interest of all persons is saved which accrues after the engrossing of the fine, so that the parties having the same pursue it within five years after it so accrues; and if at the time of the fine engrossed, or of such accruer, the persons be covert, (and no parties to the fine,) under age, in prison, out of the realm, or of *non sane* memory, they or their heirs shall have time to pursue their action within five years after such imperfection removed.

Though this statute evidently concludes all persons under the words *privies and strangers to the fine*, and the statute hath savings for strangers, but none for privies; yet it was at first doubted, whether a fine levied by tenant in tail could bar the issue by that statute; for the entails had continued so long, and most people were so fond of them, that the judges were very cautious in making so large an exposition on that statute as it would well bear. And though at length the judges resolved, that a fine with proclamations was a bar, not only to the tenant in tail, because he could claim no right against his own acknowledgment on record that it was the right of another; but also against the issue in tail, because the words and intention of the statute place the privies, that is, the persons claiming the right devolved at any time on the conusor, in the same condition as the conusor himself; yet this introduced the statute of 32 H. 8, c. 36, which by a retrospection confirms the construction made by the judges on the 4 H. 7, c. 24, and declares that

Bro. tit. *Fines*, 1 Hob. 332: Dyer, 3. The reasons of this doubt, and the opinions *pro* and *con*, may be seen, Co. Lit. 372: 2 Inst. 516, 517; Moore, 250; And. 170; Plow. 373: Jo. 39: 19 H. 8, 6, pl. 5: And. 46, pl. 118; Raym. 271, 287, 321, 345 to 349; Sir T. Jon. 238, in the case of Murray and the Earl of Derby.

All fines levied, by any person or persons of full age, of lands entailed before the same fine to themselves, or to any of their ancestors in possession, reversion, remainder, or in use, shall immediately after the fine levied, engrossed, and proclamations made, be a sufficient bar against them and their heirs claiming only by such entail, and against all others claiming only to their use, or to the use of any heir of their bodies.

32 H. 8, c. 36.

For the better explication of these statutes, it is to be observed, that the persons whose right is barred by the fine, are either *parties*, *privies*, or *strangers*. That the *parties* themselves are barred is plain, and admits of no doubt. As to *privies*, which is the material and operative word in the 4 H. 7, c. 24, it is to be noted, that it has a threefold signification, for it either comprehends a privy in (*a*) estate as between donor and donee, which arises purely from their own contract; or a relation between parties arising from (*b*) blood only, neither of which is meant by the word *privies* in the act; for it were unreasonable and absurd to allow any man to strip me of my acquisitions or inheritances, without any laches or neglect of mine,

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because I happen to be his heir, or because, by a fair contract, I am concerned in interest with him, or am his tenant.

(a) If there be two jointenants, and one of them levy a fine; or if there be donor and donee, and one of them levy a fine; though there be a privity between each of these within the letter of the act, yet neither the jointenant in the one case, nor the donor in the other, shall be barred by the fine unless they omit to make their claim within five years after their titles accrue. 2 Inst. 516. (b) So, if the heir apparent be seised of lands, and the father levy a fine and die, it shall not bar the heir, because he does not claim or derive any title to the land from his father; and therefore, in that respect, shall have five years to preserve himself from the fine. 2 Inst. 523; 3 Co. 89 a.

But the *privies* understood and intended by this act are those who are privy not only in blood to the conusor, but likewise in estate and title to the land of which the fine was levied; that is, those who must necessarily mention the conusor, and convey themselves through him before they can make out their title to the estate.

Hob. 333. And hence the issue in tail is barred. So it is, if there be baron and feme in special tail, and the baron levy a fine without the wife, this shall bar the issue though the son survive, because he must necessarily, in making out his title, show himself heir to the father as well as to the mother, and consequently, show himself privy to the conusor within the statute. Keilw. 205; Dyer, 251; 2 Inst. 681; 8 Co. 72; Hob. 257; 9 Co. 139 a; 2 Bendl. 50; Moore, 28. So, if there be grandfather and grandmother tenants in special tail, and the grandfather die, and the father enter upon the grandmother and levy a fine, the son is barred. Hob. 258, 333; 3 Co. 90; Moore, 146.

But, if tenant in tail has issue a daughter, who levies a fine, and after a son is born, the fine shall not bar the son, because he may make himself heir to the entail without any mention of her, and can make out his title without conveying himself through her; and therefore as to the estate he is a stranger to her, and may plead *quod partes finis nihil habuerunt*.

3 Co. 61; Hob. 333. So, if tenant in tail has issue two sons, and the eldest levies a fine and dies without issue in the life of his father, the second son shall inherit the entail notwithstanding the fine, because he need not mention the conusor in making out his title to the entail. Cro. Car. 434; Cro. Ja. 689; Moore, 252.

A devised land to his wife for life, remainder to his son in tail, when he should attain to his age of twenty-five years: and before that time he levied a fine: this barred his issue, though he had nothing in remainder, as it was allowed he could not have till that age. For though he was not actually tenant in tail when he levied the fine, but the vesting of the estate depended on the contingency of his coming to that age, yet the issue being obliged to make out his title through his, must be barred as a privy within the words of the 4 H. 7, c. 24, and the conusor was a person to whom the land was entailed, and so plainly within the words of the 32 H. 8, c. 36.

Grant's case, Cro. Eliz. 611; Cro. Car. 435; 10 Co. 50 a; 2 Leon. 36; Jenk. Cent. 274.

If tenant in tail levies a fine, and dies before the proclamations are past, though a right really descends to the issue, because the fine is no bar till the proclamations are past, yet after the proclamations the entail is barred. For the proclamations distinguish the fines which bar the entail from those at common law, which only discontinue it; and by the express words of 32 H. 8, c. 36, all fines levied with proclamations of any lands entailed to the person so levying the same, or to any of his ancestors, shall immediately after the proclamation made be adjudged a sufficient bar against the said person and his heirs, claiming only by force of the said entail.

Co. 86; Plow. 430, 437; Smith v. Stapleton, 2 And. 177; Moore, 628.

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Hence it is adjudged, that where A was tenant for life, remainder to B in tail, and B levied a fine, and died before all the proclamations were past, his issue being out of the realm; that after the proclamations were past, though the issue, immediately upon his return into the kingdom, made his claim to the remainder, yet it availed him nothing, but the fine was a final bar to him.

3 Co. 87; Case of Fines.

So it was where there was grandfather, father, and son; and the grandfather being tenant in tail enfeoffed the father, and afterwards disseised him, and then levied a fine with proclamations to J S, but before the proclamations were all past the father entered, and after they were all past, the conusee entered, and then the grandfather and father died, and the son brought his *formedon*; the conusee pleaded the fine with proclamations, and the demandant thereupon pleaded the entry of his father, but could recover nothing: because after the proclamations past, the fine was a good bar to the entail which was made to the grandfather who levied the fine.

Cro. Eliz. 589, 610, Hunt v. King.

And the law is the same in case of actions brought, as of an entry made to preserve the entail; for if tenant in tail levies a fine, and dies before all the proclamations are past, and the issue in tail brings a *formedon*, the conusee may plead the fine with proclamations, though they were made pending the writ.

3 Co. 90; Purslow's case, Plow. 435.

And this has been carried so far, that though a particular tenant, who is a stranger to the tenant in tail, should enter before the proclamations were past, to preserve his own right, yet the entail is barred; as, if there is A tenant for life, remainder to B in tail, remainder to C in fee, and B disseises A, and levies a fine; but before the proclamations are past, the tenant for life enters and avoids the fine as to himself, and C, though in this case, neither the estate of A nor that of C is affected by the fine, yet after the proclamations made, the entail is barred from the proclamations made, nor can any act of the issue preserve it.

Cro. Eliz. 610; Poph. 65, 66.

As tenant in tail may convey his whole estate by the fine, so may he carve any less estate out of it, which shall likewise bind the issue after his death; as, if there be a tenant for life, remainder to B in tail, and B agrees to make a lease for years to J S upon writ of covenant brought by B against J S, he may levy a fine *come ceo*, &c., to B, and B may render the land to J S for the term agreed on, with reservation of a rent; and this lease shall continue in force against the issue; because when J S conveys by the fine, though he really has no right, the tenant in tail and his issue are estopped to say otherwise than that he took a fee simple; and, consequently, it appearing by the fine that he was tenant in fee simple, he has thence a power to make a lease to bind his issue.

Plow. 430; Bro. tit. *Fines*, 106.

But, if there be tenant for life, the remainder in tail, and the tenant for life levy a fine *come ceo*, &c., to the tenant in tail, who grants and renders a rent-charge out of the land to the conusor, this fine shall not bind the issue because the rent was newly created by tenant in tail, and not entailed to him or any of his ancestors; and the entail of the land continuing, no encumbrance of the donee can affect the land any longer than his life.

And. 6; 3 Co. 89; Dyer, 213; Plow. 435.

(F) Of the Operation of a Fine barring Strangers, &c.

If there be A, tenant in tail, the remainder to B in tail, the reversion to the right heirs of the tenant in tail, and the tenant in tail bargain and sell the lands to J S, and his heirs, and then levy a fine to him, this is a bar to the issue in tail, but no displacing or discontinuance of the remainder in tail, because the bargain and sale conveyed no more than what the tenant in tail could lawfully grant, which was a descendible estate during his own life: and no estate of freehold passed by the fine, that being before conveyed by the bargain and sale.<sup>(a)</sup> But yet the fine had this effect, though subsequent to the bargain and sale, to convey the whole estate-tail to the bargainee, who before had but a descendible estate during the life of tenant in tail; because wherever a fine is levied to a person to whom the lands were entailed, and whom the issue must mention in his *formedon*, such fine cuts off the entail, and bars the issue.

10 Co. 96, Seymour's case; Bulstr. 162, S. C. (a) || No one except the person himself actually seised of an estate-tail in possession, can create a discontinuance; and here the tenant in tail was not at the date of fine seised of the estate-tail, having before parted with his estate by the bargain and sale. It cannot be done by a tenant of an estate-tail, after a subsisting estate for life, even though the tenant for life join in the fine. Bredon's case, 1 Co. 76; Driver v. Hussey, 1 H. Bl. 269. But, where a lease and release were made by a tenant in tail, and a fine was afterwards levied, in pursuance of a covenant contained in the indenture of release, and *as part of the same assurance*, it was holden that the estate-tail was discontinued by the fine. Doe v. Whitehead, 2 Burr. 704.||

If tenant in tail of a rent-charge, issuing out of a manor, levies a fine of the manor, this, by the opinion of Hobart and Harvey, is a bar of the rent, because the fine being levied of the land, inclusively gives the rent.

Heliot v. Sanders, Cro. Ja. 699. But *qu.* because there appears to be no fine levied of the rent, which being the thing entailed, and not the land, should, it seems, descend to the issue till the entail thereof be barred by a fine. || The opinion of Lord Hardwicke in this case, grounding himself upon the case of Taylor v. Shaw, Carter, 21; 1 Ves. 391, seems to have been according to the doctrine in the text. But this opinion is controverted by Lord Mansfield, who says, that the doctrines thus broadly laid down, that a rent-charge is gone by a fine of the land, is totally mistaken, and by no means warranted by the case in Carter; and that the rule is universal, that a rent-charge, in a third person, is not barred by a fine and non-claim. Goodright v. Board, M. 25 G. 3; 1 Cruise, 295.||

That the estate-tail is preserved to the issue in tail, notwithstanding any fine levied by the tenant in tail, when the reversion is in the crown, and the estate of the provision of the king, by 34 & 35 H. 8, c. 20, vide *post*, title *Recoveries*.

(F) Of the Operation of a Fine in barring Strangers, or those who have but an uncertain Interest, as a Term for Years, or barely an equitable Interest.

If tenant in tail be disseised, and the disseisor levy a fine, the disseisee has five years to make his claim by the first saving, because he is the first who has a right at the time of the fine levied; and if he omit to make his claim in that time, the issue is bound for ever.

3 Co. 87; Cro. Eliz. 896; Co. Lit. 372. Though the statutes of 4 H. 7, c. 24, and 32 H. 8, c. 36, have made the operation of fines stronger against parties and privies than they were at common law, for by them the issue in tail is bound, though not those in remainder or reversion; yet have they enlarged the privilege that strangers had at common law to avoid them. For upon these statutes they have five years from the fine to make their claim where they have a present right at the time of the fine levied; and where it accrues after the fine, they have five years from the time of such accruer; whereas by the common law in both these cases a stranger had only a year from the entry of the silver, at which time the land passed.

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If tenant in tail bargain and sell his lands, or discontinue the tail, and the bargainee and discontinue levy a fine, though five years pass in the life of the tenant in tail, yet the issue shall have five years after his death to avoid the fine; for his father having given all his right by the sale, could not claim any right against his own gift. The issue therefore is helped by the second saving, because he is the first to whom the right accrued after the fine levied.

Dyer, 3; 3 Co. 87 b; Cro. Eliz. 896.

If a mortgagee be disseised, and five years pass after the proclamations, the mortgagee is hereby barred. But, if the mortgagor pay or render his money, he has five years to prosecute his right by the second saving in the act, because his title did not accrue till the payment of the money.

Plow. 373.

If an infant disseisor be disseised, or make a feoffment, and the feoffee or disseisor levy a fine, and five years pass, the first disseissee is barred of his right by the first saving in the act, because he has a present right, which he ought to pursue immediately by action or entry; but the infant shall have five years from his full age to avoid the fine, because no laches are to be imputed to him but from the time he arrives at his full age.

A, seised of Black-acre in fee, is disseised by B, who levies a fine with proclamations of the said acre during the life of A; three years after the fine levied A dies, and his right descends to C, his grandson, as his heir, who at the time of the descent of such right was an infant; and the question was, Whether C, having suffered five years after the fine levied to pass during his ancestor's life and his own minority, without making any claim, should be barred, or should have other five years upon his arrival at full age to make his claim in? and it was adjudged, that he should not, but that he was barred, and that by virtue of the first saving in the 4 H. 7, c. 24, which saves to all persons and their heirs, other than parties to the fine, such right, claim, and interest as they have in lands and tenements whereof a fine is levied, so that they pursue such right by way of action or lawful entry within five years. Now A having a right to Black-acre at the time the fine was levied, consequently, he and his heirs must be comprehended in this saving; but then they cannot take the benefit of such comprehension unless they pursue the method and the time prescribed and limited in the said saving, which they apparently neglected to do, since neither A nor his grandson made any claim or entry, or brought any action for recovery of their right within the five years: and therefore such right must be barred and extinguished. And C, in this case shall have no privilege of infancy, because the statute intends that only in cases where the right first attached in the infant, and therefore he shall have five years after his infancy to make his claim; but here the right was first in A at the time of the fine, and the statute allows but five years to pursue the right from the time it accrues, which was not done in this case.

Plow. 356 to 372, Stowel v. Zouch.

But, if A be tenant in tail, the remainder to B in fee, and A levy a fine with proclamations, and then B die, his heir within age, and then A die without issue, and five years pass without any action brought by the heir, yet he shall either, during his minority, recover the land notwithstanding the five years lapsed, because the right first accrued to him, B having no right to the land by the remainder, till the estate-tail was spent, which did

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not happen in his life ; or the heir of B may defer making his claim till he comes of age, and then by the express words of the act he shall have five years to recover his right.

Dyer, 133.

[If an infant be in his mother's womb when a fine is levied, he will be allowed five years from the time he attains his full age to make his claim ; for although he is not comprehended within the letter of the act, which only mentions infants under the age of twenty-one years, and therefore does not extend to those who are unborn, yet they are within the intention of the act, and will be aided by the exception.

Plowd. 366.

If a person labors under several disabilities at the same time, as, if a woman is covert, under age, of insane mind, and in prison, at a time when the fine is levied, or when a right accrues to her, and one or more of those disabilities are removed ; still the five years given by the statute will not commence until all her disabilities are entirely removed.

It is now settled, notwithstanding some old opinions to the contrary, that when once the five years allowed to persons labouring under disabilities to avoid a fine begin, the time continues to run notwithstanding any subsequent disability.

Doe v. Jones, 4 T. R. 301 ; 4 Taunt. 230, S. C. cited by Mansfield, C. J.

But, if a person to whom a right accrues to lands whereof a fine hath been levied, labours under any of the disabilities specified and excepted in the statute 4 Hen. 7, and dies before his disabilities are removed, it was considered a doubtful point, whether the heir of such person was obliged to make his claim within five years after the death of his ancestor, or should be allowed an indefinite time for the purpose. But it has been determined by the Court of Common Pleas, that he must make his claim within the five years. For the exception in the first branch of the statute of 4 H. 7, and the proviso at the end of it, are to be taken together ; and being so taken, they do not amount so much to an exception as a saving, the true meaning of which is, that the rights of those persons who are under disabilities, and of their heirs, are saved as long as those disabilities continue, and five years after : the heir therefore not being himself disabled is barred, unless he prosecutes his right within five years after it accrues by the death of his ancestor dying under a disability.

See Cruise on Fines, 258, &c. ; Dillon v. Leman, 2 H. Bl. 584.]

It is a rule, that no interest is barred by a fine that is not divested and turned to a right ; for if the person who has the right continues in possession at the time of the fine levied, he is under no necessity to make his claim, or entry, or to bring his action ; [because, being still in possession, and not disturbed by the fine, he has already all the advantages which those remedies could procure him, and it would be unnecessary to pursue them.] As, if a man levies a fine of land, out of which I have a rent, common, or the like, the fine and five years' non-claim shall not affect me, because I am still in possession of my rent or common ; [I cannot recover what I still enjoy ; I cannot enter upon or claim against myself.]

2 Inst. 517 ; 9 Co. 106 a ; Cro. Ja. 60 ; 5 Co. 124 ; Vent. 81. ¶ Some modern elementary writers, says Lord Carleton, dispute this position, that no fine will bar any interest which is not *divested and put to a right*, if the words "*divested and put to a right*" are understood in their strict technical sense, that is, in the sense of depriving the party, affected by the fine, of the right of recovering his estate by entry, and of confining him

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to an action; but they all agree, that the estate or interest of the person, whose title is meant to be barred, must be so far affected, that he must be deprived of the possession, either before the fine is levied, or by the operation of the fine itself, and that, by the same means, a possession, inconsistent with his right, must be acquired. Ir. T. R. 574. See also 1 Cruise, 289; 1 Prest. Convey, 225 b. If therefore there be tenant for life, remainder for years, remainder in fee, and the remainder-man for years levies a fine, the estate for life is not barred; for it was precedent to that of the consor, and the possession of the tenant for life was not divested. Focus v. Salisbury, Hardr. 402; Com. Dig. tit. *Fine*, (I. 3). So, where A was tenant for life, remainder to B for life, remainder to C in tail; and C, during the life of A, and while A was in possession, levied a fine with proclamation, and on A's death entered and continued in possession for seven years before any entry made by B, B was not barred by such fine. Carhampton v. Carhampton, Ir. T. R. 567. So, where there was an estate to A for years, remainder to B for life, remainder to C in fee, and B levied a fine while A was in possession, the remainder to C was not barred; for the continuance of A in possession was a continual claim by C; or rather, as Mr. Preston observes, the possession of A was the continuance of the seisin to C. See the case put in Knight v. Grenville, Skin. 262, and cited in N. R. 26. See also 1 Prest. Convey. 226, 227. Unless therefore the freehold be in one of the parties at the time of levying the fine, the fine, as to the purpose of barring by non-claim, seems to be actually void, or voidable by the plea that "*partes finis nihil habuerunt tempore finis levati.*" Doe v. Holmes, 3 Wils. 249; Smith v. Packhurst, 3 Atk. 141; Roe v. Power, 2 N. R. 1; Touchst. 14, *supra* 256. Hence it is incumbent on the party producing the fine, to show that the consor was in possession at the time it was levied, or had received rent. Doe v. Williams, Cowp. 621; Carhampton v. Carhampton, Ir. T. R. 567; Doe v. Spencer, 11 East, 495. The point therefore stated in Armstrong v. Wholesley, 2 Wils. 19, that a fine *come eco*, &c. of a *reversion*, although it passes nothing, after five years, and non-claim, *will operate as a bar*, is not law. See Sugden's Gilb. Uses, 122, note.—It has been lately decided, that where a tenant for life levies a fine with proclamations, and dies seised, and devises the estate to one who enters; this does not operate as a desisein of the remainder-man; an *actual ouster* of the tenant, a *wrongful putting of him out*, being considered by the court as essential to make a disseisin. William v. Thomas, 12 East, 141. But *quid*, and vide Sugden's Gilb. Uses, 122, and Mr. Preston's argument in Jerritt v. Weare, 3 Price, 596.

As to the evidence of a seisin fact of the consor at the time of the fine levied, the following case has occurred:—Where a fine was levied of Michaelmas term, but on the 8th of November in fact, though by relation of law on the 6th a writ of possession, after a recovery in ejectment, executed on the consor's behalf on the evening of the 6th, by the officer's entry on the land and claiming it for the consor, but without any actual change of the tenant in possession, who afterwards paid rent to the consor, was holden to be sufficient evidence of a seisin in fact in the consor at the time of the fine levied. And Lord Ellenborough intimated his opinion, that a receipt of rent after a fine levied, for a period of time antecedent to the fine, would be *primâ facie* evidence of the consor's possession of the premises by his tenant during the period for which the rent was received, unless fraud or contrivance appeared. Doe v. Spencer, 11 East, 495. ||

A leases to B for years, to commence after a former lease *in esse*; the first lease is determined, and before any entry by B, the lessor enters and makes a feoffment, and levies a fine, and five years pass without any claim: B is barred of his interest; for by the general clause the fine concludes all privies and strangers; and the first saving includes the lessee in respect of the word *interest*, which a term for years may properly be called.

5 Co. 124; Saffin's case, Cro. Ja. 60; 9 Co. 105.

But, if B, who had the future interest, had died before the determination of the first lease, and upon the expiration thereof the lessee had entered and levied a fine; and after the five years' administration had been granted; the administrator should have been allowed five years to make his claim; for none had a right or title of entry before, and it accrued to him by the administration after the fine, and, consequently, he must be allowed five years from the accruer of his right. But in the former case, the lessee had a right of entry at the time of the fine levied, and therefore could have but five years from that time. But, if the lessor enters upon the first lessee,



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and levies a fine, the second lessee shall have five years after the first lease is determined, because his right then first accrued.

Leon. 99; 2 Leon. 157; Cro. Ja. 61; 5 Co. 124 a.

As, if a man settles land by fine to the use of himself for life, with a clause in the deed of uses to this effect; that if he should make a jointure to his wife, and a lease for thirty-one years to commence after his death, then the conusees should stand seised to such uses; he makes a lease accordingly, and then he and his wife levy a fine; the lease is not barred, though five years should pass without entry or claim; because he having but a future interest, such interest is not displaced or divested by the fine; consequently, an entry were fruitless to preserve that which was not touched by the fine. Besides, this being an *interesse termini*, the lessee had no right till after the death of the lessor; consequently, he must have five years from the accrual of the right to preserve it.

Hardr. 410, 413, 415, Edwards v. Slater.

A copyholder may be barred by a fine and non-claim, because it is an interest within the statute. So, executors, that have land till debts and legacies are paid, may be barred by a fine and five years' non-claim, because they likewise have an interest within the words of the statute.

9 Co. 105 a; Margaret Podger's case, 5 Co. 124.

If there be tenant by *elegit*, statute merchant or staple, and a fine be levied of those lands, and five years pass without any claim, they are bound by the fine, because they have each of them an interest within the words and intention of the statutes, and thereby shall be bound if they do not pursue their rights within five years. (a)

2 Inst. 517; 5 Co. 134 a; Plow. 374. So it is, if an inquisition upon an *elegit* be found, and then a fine be levied of the lands, and five years pass without any claim, the interest of the tenant is barred; because, after the inquisition found, the party before entry has the possession, and may have an ejectment or trespass, and therefore his interest may be displaced, and consequently, his right barred. Mod. 217, Ognel v. Lord Arlington. (a) [And in the case of Deighton v. Grenville, 2 Vent. 333; 1 Show. 36; Skin. 260, all the judges agreed, that although the cognisees of statutes-merchant did not enter, yet that they had possession in law, in consequence of their extents and *liberates*, which gave them a right of entry, and therefore they might be barred by a fine. However, they cannot be barred until they have extended the lands, or pursued their rights in some other manner, for until then they have no right to enter on the lands, and, therefore, cannot be put out of possession. 1 Mod. 217.]

But, if a man have a judgment for a debt at common law, and the debt or before the land extended alien by fine, and five years pass, the plaintiff may still have a *scire facias* and an *elegit*. So it is of a conusee of a statute before execution sued. For though the judgment and execution be incumbrances that are chargeable upon the estate, yet before execution sued, the conusee, &c., has no right to the land; for his release of all his right to the land will not hinder him from suing out execution, and, consequently, he cannot be barred by a fine, unless he omit to make his claim in five years after the extent, for then his right first accrues.

Mod. 217. So, if a man has a decree in Chancery to charge lands, and the tenant of the land, after the decree, aliens by fine, and five years pass, yet the plaintiff may have execution; because, till the decree be executed, he has no right to the land, and therefore is not obliged to make any entry or claim to preserve it till his title accrues. Chan. Cases, 268.

[The estate of a devisee may be barred by a fine and non-claim if the devisee has not entered; as, where John Metcalf devised lands to John Gallant, an infant of the age of three years, in fee; the son and heir of

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John Metcalf entered on the lands, and levied a fine of them; and John Gallant the infant died before he attained his full age, leaving a sister, who was then married; the court were of opinion, that the sister must make her claim within five years after the death of her husband, otherwise the fine would bar her.

Hulm v. Heylock, Cro. Car. 200.

A title of entry for a condition broken may be barred by a fine levied by the grantee or devisee of the conditional estate; as, where lands were devised to trustees and their heirs, upon condition that they should pay a certain sum of money every year for the support of a schoolmaster, &c.; and, on non-performance of the trusts, the lands were devised over to other persons; the trustees neglected to perform the trusts, and levied a fine of the lands; it was determined that the fine was a good bar to the persons who had a title to enter on breach of the condition.

Mayor of London v. Alsford, Cro. Car. 575; Sir W. Jones, 452.

A title of entry for a condition broken may also be barred by a fine levied by the grantor of the conditional estate: as, if a person makes a feoffment on condition, and before the condition is broken, the feoffor levies a fine of the same lands, either to the feoffee, or to any other person, the condition will be thereby discharged for ever. But, if the fine was levied for the purpose of corroborating the conveyance by which the condition was created, it will not destroy the condition; for in that case the fine and conveyance will be construed together, and will operate as one assurance.

Touchst. 154; Cromwell's case, 2 Co. 69.

It seems, that a right or title of entry on any other account may also be barred by a fine. Thus, where Humphrey Mackworth was seised to him and his heirs, provided that if a hundred pounds were not paid within three months after the birth of a child, the trustees should enter; the money was not paid; so that the estate of Humphrey being with a *quousque* ceased, but the trustees did not enter: Humphrey conveyed away the lands by lease and release, and levied a fine; after which five years passed: Lord Chief Justice Bridgman delivered the opinion of the court, that the entry of the trustees was barred by the fine.

Thomasin v. Mackworth, Carter, 75. In this case it is to be observed, the fine was levied after the right of entry accrued. 1 Prest. Convey. 234.

A power appendant, or in gross, may be barred by a fine levied of the lands to which the power relates, by the person to whom such power is reserved; because, by the fine, the person acknowledges all his right and interest in the lands to be vested in an other; and therefore it would be repugnant to that acknowledgment that he should ever afterwards claim any power over those lands. Besides, a power appendant, or in gross, being part of the old dominion, is considered as an interest, which may be released. Thus, where Christopher Digges, being seised in fee, covenanted to stand seised to the use of himself for life, remainder over, reserving to himself a power of revocation, by deed indented and enrolled; and Christopher Digges revoked the uses; but, before the deed of revocation was enrolled, he levied a fine; it was resolved that the fine being levied before the enrolment of the deed of revocation, until which time the revocation was imperfect, had destroyed the power.

1 Inst. 237 a; 3 Rep. 83 a; Digge's case, 1 Rep. 173. See Penne v. Peacock, Ca. temp. Talb. 41.

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A power of revocation may also be destroyed in part, by levying a fine of part of the land, and yet the power will continue good as to the residue.

1 Inst. 215 a; Touchst. 501.

If a person who has a power appendant, or in gross, levies a fine of the lands to which the power relates, and afterwards by deed declares that such fine shall enure as an execution of his power, the fine and declaration of uses will in that case be considered as one assurance, and will not destroy the power.

Herring v. Brown, 2 Show. 185; 1 Ventr. 368; Carth. 22; Comb. 11; Skin. 184; 1 Freem. S. C.; Doe v. Whitehead, Dougl. 45, S. P.

A power collateral to the land, which is not joined with an interest, cannot be destroyed by a fine levied by the person to whom such a power is reserved; because it is considered as a bare and naked authority, which cannot be released or divested. Thus it is said by Lord Chief Justice Popham in Digges's case, that if a feoffment was made to A in fee to divers uses, with a proviso that it should be lawful for B to revoke those uses, B could not in that case release his power, nor extinguish nor destroy it by a fine, because it was a collateral power; for the land did not move from him, nor would the party have been in by him, if he had executed the power.

1 Inst. 237 a, 265 b; 1 Rep. 174 a.

It follows from the same principles that a collateral power cannot be barred by the fine of a stranger: as, where a person by a proviso in his marriage-settlement gave his wife a power to dispose of one hundred pounds to such persons as she should appoint, to be paid within one year after his decease; and in default of payment one John Moreton was empowered to make a lease of certain lands to raise that sum; the wife, in a year after the death of her husband, made an appointment of this sum, but it was not paid; the heir of the husband levied a fine of the land, and five years passed, and afterwards the appointees of the one hundred pounds brought their bill to be paid that sum; Lord Hardwicke observed, that although by the several statutes relating to fines, all right, claim, and interest which strangers had, were barred by a fine, yet that such a stranger as John Moreton, who had no interest, but only a bare naked power, and who could not have made an entry, was not affected by it.

Willis v. Shorrall, 1 Atk. 474.

A fine and non-claim is a good bar to a writ of error, in consequence of the word "actions" in the second saving of the statute, 4 Hen. 7; and a fine is also a good bar to a writ of error to reverse a common recovery.

Bartholomew v. Bellfield, Cro. Ja. 332.]

If lessee for years be ousted, and he in reversion disseised, and the disseisor levy a fine; this and five years' non-claim shall bar both; because the lessee for years may have his ejectment, and the lessor his assize.

9 Co. 105. But, if lessee for life be disseised, the reversioner shall have five years after the death of the particular tenant, because he can have no action to recover the freehold. 9 Co. 105 b; Co. Lit. 250; Plow. 374.

If lessee for life or years makes a feoffment and levies a fine, and five years pass without entry or claim by the reversioner, and then the lessee dies, the reversioner has five years to preserve his right, because he has two different rights in this case upon the feoffment and fine; one immediately accrues by the act of the lessee in committing the forfeiture; the

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other upon the death of the lessee or expiration of the term; and therefore he shall not forfeit the last by omitting to take advantage of the first. Wherefore, if the reversioner omits to enter upon the breach of the condition in law, yet his old right, which accrues upon the death of the lessee, or expiration of the term, still continuing, is saved by the statute, which preserves future rights, as well as those *in presenti*.

Anon. Moore, 71; Laund v. Tucker, Ct. El. 254; Case of Fines, 78 b; Whaley v. Tankard, 1 Ventr. 241; Sir T. Raym. 219, S. C.; 2 Ventr. 52, S. C.; 3 Keb. 37, 110, S. C.; Brandlyn v. Ord, 1 Atk. 571; Willes, 341, S. C.; Goodright v. Forrester, 8 East, 552; 1 Taunt. 578. But, if tenant in tail makes a lease for life, and so discontinues the tail, and then levies a fine with proclamations, and dies without issue, and five years pass without any entry or claim, the remainder-man is barred; because upon the death of tenant in tail without issue his title commenced, and he shall be allowed but five years from thence to preserve it. Salvin v. Clerk, Cro. Car. 156.

[If lands are extended on two statutes, and the person who is seised of the land levies a fine; though the cognisee of the first statute must make his claim within five years after the fine has been levied, otherwise he will be for ever barred; yet the cognisee of the other statute need not make his claim until satisfaction has been entered upon record on the first statute, because that is the only proper determination of an extent, so that he will have five years allowed him from that time to avoid the fine by the second saving in the statute 4 H. 7; because until then his right did not accrue.

Deighton v. Grenville, 2 Ventr. 333; 1 Show. 36; Skin. 260, S. C.; Lords' Journals, vol. 16, p. 454; 26th April, 1699; Cruise on Fines, 242, &c.]

If there be tenant for life, the remainder to B in tail, and the lessee levy a fine, B being out of the realm; if B die beyond sea, the issue in tail is at large to avoid the fine when he pleases: for that clause of the 4 H. 7, c. 24, which gives persons out of the realm, infants, &c., and their heirs, five years after their impediments removed, to pursue their right, cannot be extended to this case, because B being dead, cannot return into the realm to make his claim, and the clause limits five years to him and his heirs after his return, which now is become impossible.

2 Inst. 519.

A copyholder of a dean and chapter levied a fine with proclamations, and five years passed without any claim by him that was dean at the time of the fine; yet the succeeding dean was not bound by the fine; because, if that were allowed, the statutes of 1 El. c. 19 & 13 El. c. 10, would be of little use to restrain alienations; for then, by combination between the dean and tenant, all lands belonging to the chapter might be aliened.

Vent. 311, Howlett v. Carpenter.

[Although the statute 4 H. 7 does not extend to the possessions of the church, yet in case a bishop, dean, vicar, or prebendary should neglect to make his claim within five years after a fine levied of an estate to which he was entitled in right of his bishopric, &c., he will be barred during his life, but his successor will be allowed five years to avoid the fine from the time of his becoming entitled to the lands.

Plowd. 538.]

If lessee for years assigns his term in trust for himself, and afterwards purchases the inheritance and occupies the land, and then levies a fine, and five years pass without claim by the assignee, the term is lost; for neither the *cestui que trust*, nor the termor, has any remedy: nor the *cestui que trust*, because he by the fine hath acknowledged the land to be the right and

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inheritance of the conusee; and it were unreasonable to allow him any pretensions after so solemn a confession to the contrary: not the termor, because he having a right at the time of the fine levied, and omitting to make his claim within five years, is barred by the express words of the statute. So it is, if tenant in fee simple makes a lease for 100 years to attend the inheritance in trust for himself, and still continues in possession, and makes a lease for fifty years, and levies a fine *sur conusance de droit* to confirm it, and five years pass without any claim by the first lessee, his interest is barred by the fine; for the second lease and the fine divested the first term out of the lessee, and, consequently, if there be no claim by him in five years, his interest must be barred.

Cro. Car. 110, *Morris v. Isham*; Lev. 270; *Freeman and Barns*, Sid. 478; Vent. 80; Chan. Rep. 51, 65.

But, if a man purchases the fee simple of Black-acre, of which there is a long lease in being, and the conveyance is made by fine, and the purchaser, to protect the inheritance, has an assignment of the term in trust for himself; though the termor makes no claim in five years, yet the term continues; because the statute of fines being made for the security of purchasers, it would weaken their interest, if fines destroyed such leases against the intention of all parties.

Sid. 460; Vent. 82; Lev. 272.

Thus, if a man mortgages his land, and, as is usual, still continues in possession, and levies a fine, and five years pass, yet the mortgagee is not barred: for though the mortgagee be in reality out of possession, yet when that is by the consent of both parties, and the nature of the contract requires it should be so while the interest is paid, it is against the original design of the contract that any act of the mortgagor, except the payment of the money, should deprive the mortgagee of his security, and is no less than a fraud, which the law will not countenance.

Sid. 460; Vent. 82; Lev. 272; 2 Ves. 482. So, if the mortgagee is in possession, and levies a fine, and the five years pass, yet upon payment of the money the mortgagor may enter, 1 Vern. 132, and there said to be a new way of foreclosing the equity of redemption. But vide 2 Vern. 189.

Thus it has been adjudged, where a man was lessee for years of one part of a manor, and tenant at will of another, rendering rent, and the lessee made a lease for life, and then levied a fine to the tenant for life, but still continued in possession and paid the rent, that this fine should not bar the lessor; because this is visibly a fraud and trick in the first lessee, which he shall reap no benefit by, and the lessor had no reason to make his claim while the rent was duly paid him.

3 Co. 77, *Fermor's case*.

It is agreed on all hands, that a fine and non-claim will bar a trust, because the *cestui que trust* has an equitable interest, and therefore ought to pursue it by proper remedies to secure it; yet this must be understood with these following restrictions.

Chan. Cases, 268; 2 Chan. Cases, 247.

1. Where the purchaser has notice of the trust, though the trustee conveys to him by fine, and five years pass without any claim by the *cestui que trust*, yet the trust is not barred, because where the purchaser has notice, he sees the title of the vendor, and what power he has to convey; and therefore, when he takes the land from him, shall be presumed to hold it in the

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same plight, and that the vendor could not make him a better title than he had in himself; and when the purchaser takes it upon these terms, the trust is undisturbed, and *cestui que trust's* interest no way affected by the fine.

1 Vern. 149; *Shields v. Atkins*, 3 Atk. 563; *Lord Pomfret v. Lord Windsor*, 2 Ves. 481; *Kennedy v. Daly*, 1 Sch. & Lefr. 355. [So, where a person to whom lands were devised chargeable with legacies, levied a fine, on which there was a five years' non-claim, and afterwards granted a rent-charge, and mortgaged the lands; it was decreed, that the fine and non-claim were no bar to the legatees, because the devisee having no title but under the will, must have notice of them. *Drapers' Company v. Yardley*, 2 Vern. 662.]

2. Though the trustee should convey by fine to a purchaser, who had no notice, and thereby and five years' non-claim the *cestui que trust* should be barred; yet if the purchaser should re-convey to the trustee, the bar from the re-conveyance ceases, and the trust as to him revives again; for he that was originally invested with a trust shall never be allowed to plead his own tortious act in his own justification, for that were to allow a man to plead his crime in his own defence, and excuse of his treachery.

2 Chan. Cases, 124, 125, 126, *Bovey and Smith*; Vern. 60, S. C.

[And a fine levied by a trustee will not be allowed to affect the interest of the *cestui que trust*.

Thus in the above case of *Bovey v. Smith*, the lord keeper put this case to Serjeant Maynard,—“A seised in fee in trust for B, for full consideration conveys to C, the purchaser having notice of the trust; and afterwards C, to strengthen his own estate, levies a fine. Whether B, the *cestui que trust*, be not in that case bound to enter within five years? and the counsel were all of opinion, that he was not; for C, having purchased with notice, notwithstanding any consideration paid by him, was but a trustee for B, and so the estate not being displaced, the fine cannot bar.”

1 Vern. 149.

So in the case of *Shields v. Atkins*, Lord Hardwicke says, it would be dangerous, where a person enters on the foot of a trust, and never makes any declaration of his having performed the trust, to construe this such an entry, as that a fine and non-claim afterwards would be a bar. And in the case of *Lord Pomfret v. Lord Windsor*, his lordship observed, that a court of equity would not suffer a fine levied by a trustee to bar an equitable right; and that if a practice of this kind was allowed to prevail, a court of equity might as well be abolished by act of parliament.

3 Atk. 563; 2 Vesey, 481; 2 Atk. 631, S. P. See also *Bowles v. Stewart*, 1 Sch. & Lefr. 209.

If lands are devised to trustees till debts paid, and then to an infant and his heirs, and J S a stranger enters on the lands and levies a fine, and five years and non-claim pass, and the infant, when of age, brings an ejectment, but is barred, because the trustees ought to have entered; yet equity will relieve, and not suffer an infant to be barred by the laches of his trustees, nor to be barred of a trust estate during his infancy; and the infant in this case shall recover the mesne profits.

2 Vern. 368, *Allen v. Sayer*.

[But, if the title is merely a legal one, and a man has purchased an estate which he sees himself has a defect on the face of the deeds, yet the fine will be a bar, and will not affect the purchaser with notice, so as to make him a trustee for the person who had the right; because as Lord Hardwicke ob-

(F) Of the Operation of a Fine barring Strangers, &c.

serves, this would be carrying it much too far, for the defect upon the face of the deeds is often the occasion of the fine being levied.

2 Atk. 631.

Before the statute of uses, if a *cestui que use* had levied a fine, it might have been avoided at any time by the plea *quod partes finis nihil habuerunt*, as the *cestui que use* had no estate in the land, but was barely tenant at will to his feoffees. But modern chancellors have very much altered the law in this respect, having laid it down as a general rule, that any legal conveyance or assurance by the *cestui que trust*, shall have the same effect and operation on the trust estate, as it would have had on the legal estate, if the trustees had conveyed it to the *cestui que trust*. So that now a *cestui que trust* in tail may, by a fine duly levied, bar his issue as fully as if he had the legal estate; for otherwise trustees by refusing, or by not being capable of executing their trust, might prevent the tenant in tail from exercising the power given him by the law over his estate, which would be extremely inconvenient, and would tend to the introduction of perpetuities.

Year Book, 27 Hen. 8, 20; Bro. Ab. tit. *Fine*, pl. 4; 1 Chan. Ca. 213; Ca. temp. Talb. 43.

A *cestui que trust* in tail may not only bar his own issue by a fine, but also the persons in remainder or reversion, unless they make their claim within the time specified by the statute.

Basket v. Pierce, 1 Vern. 226.

Where a fine is levied pursuant to a decree of the Court of Chancery for a particular purpose, that court will not permit it to operate farther than the decree directs.

Goodrick v. Brown, 1 Chan. Ca. 49; 2 Vern. 56.

The intention of marriage articles is so far considered in equity, that if a fine be levied of the lands comprehended in such articles to different uses, a court of equity will compel a conveyance of the lands to the uses of the marriage articles, notwithstanding the fine.

Trevor v. Trevor, 1 P. Wms. 622; 2 Br. P. C. 122.

The plea of a fine and long possession under it, is not a good bar to a bill brought for a discovery of the deeds, declaring the uses of such fine.

Holt v. Lowe, 4 Br. P. C. 253.

A springing or shifting use cannot be barred by a fine levied of the estate out of which such springing or shifting use is to arise.

Loyd v. Carew, Show, P. C. 137.]

|| By a marriage settlement an estate was limited to the use of the husband and wife for life, with remainders to the children of the marriage, and in default of issue to the right heirs of husband and wife. There was a power in the husband and wife to charge the estate during their lives, and a power to certain trustees in whom the legal estate was vested, to sell on the direction of the husband and wife or the survivor. The husband and wife borrowed money by way of annuity, created a term of 1000 years, and levied a fine to G in fee, which by a deed to lead the uses was declared to be in trust to cause the regular payment of the annuity and to corroborate the said term; it was held, that this fine did not extinguish the trustees' power to sell under the direction of the wife.

Tyrrell v. Marsh, 3 Bing. 31.

(G) Of the Remedies given to Strangers by Claim, &c.

A fine and non-claim cannot be pleaded in bar to a bill to prevent the setting up of an outstanding term.

Leigh v. Leigh, 1 Sim. R. 349.

To a plea in bar of a fine a direct positive averment of seisin is necessary.

Dobson v. Leadbeter, 13 Ves. 230.||

(G) Of the Remedies given to Strangers by Claim and Entry for the preservation of their Rights.

If a man have only a right of action, and his entry be taken away, (a) there a claim or actual entry on the land will not preserve his right, or avoid the fine; because though he has a right to the land, yet since he has not pursued it in the manner the law has prescribed, it is as ineffectual as if it had been quiet.

(a) [As where a fine operates as a discontinuance of the estate, in which case a real action must be brought. 1 Vern. 212.]

|| A husband claiming in right of his wife in order to avoid a fine, must enter within five years after his title accrues.

Doe v. Plumtree, 3 Barn. & A. 474.

Where an ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the statute 4 H. 7, c. 24, it is not necessary for the lessor to prove an actual entry to avoid such a fine, considering it to operate only as a fine at common law; by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue.

Doe v. Watts, 9 East, 17.||

A man that has a right of entry may empower another to enter for him, and such entry is sufficient to avoid a fine; for what another does by my command or direction, is looked upon to be my own act.

Moore, 450.

But, where a man enters in my name, and without my direction, this does not avoid the fine, or preserve my right; because the statute preserves my right only in case I pursue it by entry, &c., in five years; but what a stranger does in my name, without my direction, is not my act, and, consequently, cannot avoid the fine. Yet in this case, if a stranger enters without my direction, and I agree to and approve of the entry within five years, this is sufficient to avoid the fine; because my subsequent assent and approbation is equivalent to a precedent command, and therefore the act of another by my direction is my own.

Poph. 108; Pollard v. Lutterall, Co. Litt. 245.

Lessee for life levied a fine *come ceo*, &c., with proclamations, and he in reversion, five years after his death, brought his ejectment, and a stranger by his direction delivered a declaration in ejectment to the tenant in possession; yet this was adjudged no entry to avoid the fine. || For when a fine with proclamations is levied, and there is a right of entry, an ejectment cannot be maintained without an actual entry made for the express and declared purpose of avoiding the fine, and on some day subsequent to that entry the demise in the ejectment must be laid. But a fine at common law may be avoided without actual entry, and the confession of lease, entry, and ouster will be sufficient. So of a fine with proclamations, if all the proclamations



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are not made at the time when the ejectment is brought; for then it is in truth merely a fine at common law.

Clerk v. Pywell, Saund. 319; Vent. 42, S. C.; 1 Mod. 10; Berrington v. Parkhurst, 2 Str. 1086; Andr. 125, S. C.; 13 East, 489, S. C.; 4 Br. P. C. 353, S. C.; Hughes v. Thorne, 8 East, 474; Bates v. Brydon, 3 Burr. 1897; Bull. N. P. 103, S. C.; Goodright v. Carter, Dougl. 478; Jenkins v. Prichard, 2 Wils. 45; Doe v. Hicks, 7 T. R. 727; Doe v. Watts, 9 East, 17, in which the case of Tapner v. Merlott, Willes, 177, was over-ruled. See also 1 Prest. Convey. 246, 247, and the note at the end of the case of Doe v. Watts, *ubi supra*.

And the law is the same with respect to a fine with proclamations levied by lessee for years. But no one, except the person who is the owner of the reversion when the fine is levied, can take advantage of the forfeiture incurred by levying the fine. The right of entry for the forfeiture cannot be transferred to an assignee. When (a) the person who had the remainder or reversion has merely a right of entry, he cannot, after his estate is turned into a right of entry, make any alienation.

Fenn v. Smart, 12 East, 444. (a) Perk. § 63, 65, 86, 157; Lit. § 347; Co. Lit. 486, 214 a, 266 a; Touchst. 325; Blunden v. Baugh, Cro. Car. 304; Bunker v. Cook, 11 Mod. 128; Taylor v. Horde, 1 Burr. 113; Attorney-General v. Vigor, 8 Ves. 282; Goodright v. Forrester, 8 East, 552; 1 Taunt. 678.]]

If an action be brought to recover lands of which a fine was levied, and the demandant discontinues, this is no claim to avoid the fine, because the discontinuance shows no intent of the demandant to preserve his right.

Dallison, 116; Vent. 45.

[The suing out of a writ, and delivering it to the sheriff, does not amount to a pursuing of a claim or title by way of action, unless the writ be returned by the sheriff.

2 Leon. 221.

If the claim be made by action, it must be a real action; so that an ejectment will not suffice. Nor is a bill in Chancery such a claim under the statute 4 Hen. 7, as will avoid a fine.

2 Bl. Rep. 994; Dal 116. See 5 Ves. 238.

There is however an exception to this rule, in the case where a fine has been levied of a trust estate, because no entry by the *cestui que trust*, or claim, or other legal act, will be sufficient to avoid the fine, or suspend the bar arising from the non-claim; it can only be done by bill in Chancery, as the claim to avoid a fine ought to be of a nature which corresponds with the estate.

1 Ch. Ca. 268, 278; 2 Bl. Rep. 994.

And even where the subject-matter of the suit is of legal jurisdiction, the filing of a bill in a court of equity will, in some instances, prevent the bar arising from a fine and non-claim. And in cases of this kind, the court will direct a trial at law, with an order that the defendants shall not set up the fine in bar of the plaintiff's claim, upon the same principle that it sometimes directs the defendants in a suit at law shall not plead the statute of limitations.

2 Atk. 389; Pincke v. Thornycrofte, 1 Br. Ch. Rep. 289; Printed Cases Dom. Proc. 1784; 4 Br. P. C. 92, 2d edit.

The entry of one joint-tenant, coparcener, or tenant in common, will be sufficient to avoid the effect of a fine, as to the other joint-tenant, coparcener, or tenant in common.

1 Cruise, 344.]

(II) Of erroneous Fines, and the Manner of reversing them.

|| But the entry of one parcener, who has been under a disability for above twenty years, will not give a right of entry to another parcener, who is already barred by the statute of limitations.

Roe v. Rowleston, 2 Taunt. 441.||

By st. 4 Ann. c. 16, § 16, it is enacted "That no claim or entry to be made of or upon any lands, tenements, or hereditaments shall be of any force or effect to avoid any fine levied or to be levied with proclamations, according to the form of the statute, in that case made and provided, in the queen's court of Common Pleas at Westminster, or in the courts of Sessions in any of the counties palatine, or in the courts of Grand Sessions in Wales, of any lands, tenements, or hereditaments, or shall be a sufficient entry or claim within the statute, made in the twenty-first year of King James the first, intituled *An Act for limitation of actions, and for avoiding of suits at law*, unless upon such entry or claim an action shall be commenced within one year next after the making of such entry or claim, and prosecuted with effect."

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AND here in the first place it is to be observed, that no person can bring a writ of error to reverse a fine, or any judgment, that is not entitled to the land, &c., of which the fine was levied; for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title till the right owner appears. Besides, where the plaintiff in the writ of error cannot make out a title, he can receive no damage by the fine, which the writ of error always supposes to be done, though it should be erroneous; and therefore it is no less than trifling with the courts of justice to seek relief, when he cannot make it appear he has received any injury.

Ro. Abr. 747; Dyer, 90; 3 Lev. 36. As, if a man settles land to the use of himself and the heirs of his body, the remainder to his own right heirs, and dies, leaving issue only a daughter, who levies a fine, and dies without issue; and J S brings a writ of error as cousin and collateral heir of the daughter, yet he shall not reverse the fine; for there could no right descend to him from the daughter, because she had but an estate-tail, which determined by her death without issue; and it does not appear that the remainder was in the daughter as right heir. Dyer, 89; Cro. Eliz. 469, S. C., 3 Lev. 36, S. C. cited. So, if tenant in tail female levies a fine, which happens to be erroneous, and dies, leaving a daughter and a son, the daughter shall have the writ of error, and not the son, because she is to enjoy the land. Ro. Abr. 744; Dy. 90 a. [So, if one who is seised, *ex parte maternâ* levies a fine in which there is error, the heir *ex parte maternâ* will be entitled to the writ of error. 1 Leon. 261. So, the younger son, when entitled to lands by the custom of borough-english, shall have the writ of error, and not the heir at common law, for this remedy descends with the lands. Id. ibid. Yet a brother of the half-blood is not entitled to bring a writ of error on a fine levied by his elder brother; though if there had not been such fine, the land would have descended to him. Co. Lit. 14 a, n. 6.] If a man releases all his right, or makes a feoffment of all the lands, of which an erroneous fine was levied, he shall have no writ of error; but, if the release of feoffment were only of part, he may bring a writ of error to reverse the fine, as to the rest. Cro. Eliz. 469; Owen, 25; Ro. Abr. 788; Moore, 365, 413; Jon. 352.

But, if there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, though they themselves can have nothing.

Ro. Abr. 746; Dyer, 89. This, Rolle says, is only for conformity; but there seems to be something of justice in the practice, that they who joined in the fine, and thereby contributed to an illegal disposition (for such is an erroneous fine) of what another man had a right to, should be instrumental and assistant to the recovery of it.

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Another rule to be observed is, that nothing can be assigned for error that contradicts the record; for the records of the courts of justice being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it.

Ro. Abr. 757.

And hence it is, that, in a writ of error to reverse a fine, the plaintiff cannot assign that the conusor died before the *teste* of the *dedimus potestatem*, because that contradicts the record of the conusance taken by the commissioners, which evidently shows that the conusor was then alive, because they took his conusance after they were armed with the commission and the *dedimus* issued.

Dyer, 89 b; Ro. Abr. 757; Cro. Eliz. 469.

But the plaintiff in error may say, that after conusance taken, and before the certificate thereof returned, the conusor died; because this is consistent with the record.

Ro. Abr. 557.

If a conusance upon a fine be made in court, the plaintiff in error cannot assign for error, that the conusor died before the return of the writ of covenant, for that would directly contradict the record; because the conusance in court is never made till the writ of covenant be returned, the parties till then not being judicially before the court.

Cro. Eliz. 468.

If the conusance be taken before commissioners *in pais*, the plaintiff cannot assign for error, that the conusor died before the return of the writ of covenant, for the *dedimus* may issue the day after the writ of covenant, and may recite it as pending before the return thereof.

Ro. Abr. 757; Cro. Ja. 11; Cro. Eliz. 468. Vide Raym. 462; 2 Jon. 181, *cont.*

A conusance of a fine was taken before R. M., one of the justices of C. B., and after, in the prosecution of the fine, the *dedimus* was directed to Sir R. M., he being after the conusance made a knight, who returned the *dedimus* with his name and title; and this was assigned for error, that the person who took the conusance was not the same that was empowered to take it: but it was not allowed, because it contradicts the record, which is, that the *dedimus* was directed to Sir R. M., and that Sir R. M., by virtue thereof, took the conusance.

Yel. 33; Arundell v. Arundell, Ro. Abr. 757; Cro. Ja. 11, 12.

If a *dedimus* be awarded to two, and one only take the conusance of the fine, this may be assigned for error; because where one of the commissioners only certifies the conusance, the assignment does not contradict the record. But in this case, if the fine had afterwards been drawn up as a fine acknowledged in court, there the erroneous conusance taken upon the *dedimus* shall not be assigned for error, because it shall be taken as a fine acknowledged in court only, and no averment of the party shall be admitted to disprove the record.

Cro. Eliz. 240; Yel. 34.

If one of my name levies a fine of my land, I may avoid this fine by showing the special matter; as to say, that there are two of my name, one of Sale, and the other of Dale, and that he of Sale levied the fine,

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and not I, who am of Dale ; for this is consistent with the record, because I still admit that one of my name levied the fine.

Co. Reading, 9 ; Cro. Eliz. 531 ; Hubert's case, Moore, pl. 866 ; 12 Co. 123, S. C., where the court may order a vacat to be entered on the roll, or a re-conveyance of the estate.

No man can have a writ of error to reverse a fine that took any estate by it.

5 Co. 39, Tey's case.

One Parrott married A who had an estate of inheritance of a considerable value, and whilst she was under age he prevailed on her to levy a fine with him of those lands, the uses whereof were declared to him and her and the heirs of their two bodies, remainder to the heirs of the survivor ; this fine was taken in the country by virtue of a *dedimus potestatem* to Sir Herbert Parrott, his father, and an ignorant carpenter ; after which the wife died without issue, and now her heir at law prayed the relief of the court : upon examination it did appear, that Sir Herbert did examine the woman, whether she were willing to levy the fine, and asked her husband and her whether she were of age or not, and both answered that she was ; and now her heir moved that this fine might be set aside, and a fine imposed upon the commissioners for this undue practice in taking a fine of one under age. But all the court agreed that they could not meddle with the fine ; but if the wife had been alive, and still under age, they might bring her in by *habeas corpus*, and inspect her, and set aside the fine upon motion ; for perhaps the husband would not suffer the bringing or proceeding in a writ of error. And the court were of opinion, that it was the duty of commissioners to inform themselves of the party's age, and that a voluntary ignorance would not excuse them ; and that if a commissioner to take a fine execute it corruptly, he may be fined by the court ; for in relation to the fine, (which is the proper business of this court,) he is subject to the censures of it, as attorneys, &c. But here it did not appear that Sir Herbert Parrott knew that she was under age, and therefore the court would not fine him.

Herbert Parrott's case, 2 Ventr. 30 ; Mod. 246, S. C. in C. B. Vide 12 Co. 121, Anne Hungate's case ; Ro. Rep. 113, 114, S. C. ; 12 Co. 123, Mansfield's case ; 12 Co. 124, Warecomb and Carroll's case.

Husband and wife, the wife being but sixteen years of age, levied a fine, which was taken by virtue of a *dedimus*, and they being brought into the court of C. B. by complaint of the remainder-man, a vacat was entered of the fine *quoad* the woman, and the court directed the remainder-man to prosecute an information against him who took the caption of the fine.

Hutchison's case, 3 Lev. 36.

A having inveigled his wife to levy a fine of her land to him when she lay on her death-bed, pretending, as was suggested, he was to have it only for his life ; a *dedimus* was sent into the country to take the fine, and the caption was taken the very day she died ; and because the fine would not have stood, the party being dead before the king's silver was paid, the writ of covenant was rased in the teste, and made to bear date ten days backward, and all the other parts of the fine were rased likewise, and made to correspond with it, and the king's silver was paid, and so all appeared on the record to have been done before the death of the woman : on a bill brought in the Court of Chancery to have the fine set aside, or to have a re-conveyance, it was holden by the court, that though Chancery has a power to relieve as much against a fine obtained by fraud or practice, as

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any other kind of conveyance, yet that such relief was not by decreeing a vacat of the fine, but by ordering a re-conveyance; but for any error in the fine, or irregularity or ill practice in the commissioners, it was a matter properly cognisable in that court where the fine was levied, and for which that court may vacate the fine; but there being no proof of fraud or practice in this case the bill was dismissed.

Eq. Cas. Abr. 258, St. John and Turner. See *acc.* 1 Vern. 205; 2 Vern. 307, 678; 2 Atk. 381, 390.

The manner of reversing fines differs from the method observed in reversing other judgments; for in all other cases, where the suit is adversary, the record itself is removed; but in a case of a fine the transcript only is removed; for where the suit is adversary, the record itself is transmitted, that it may be a precedent in like cases; but fines are only a more solemn acknowledgment or contract of the parties; and therefore are no memorials of the law, and need only be affirmed or vacated; if the former, the contract stands as it was; if the latter, the justices of B. R. may send for the fine itself and reverse it, or they may send a writ to the treasurer and chamberlain to take it off the file. Besides, should the record itself be removed and affirmed, it could not be engrossed for want of a chirographer in B. R., and for this reason, my Lord Coke says, a fine levied in B. R. is voidable by writ of error.

Ro. Abr. 752; F. N. B. 20 b; 2 Bend. 51; Dyer, 89; Ro. Abr. 753; Co. Reading, 12; Salk, 337, by which last book a writ of error *coram vobis* lies upon an affirmation of a fine in B. R.

If there be tenant for life, remainder to an infant in fee, and they two join in a fine, the infant may bring a writ of error and reverse the fine as to himself, but it shall stand good as to the tenant for life; for the disability of the infant shall not render the contract of the tenant for life, who was of full age, ineffectual.<sup>(a)</sup>

Leon. 115, 317; 2 Sid. 55; 2 Jon. 182. (a) [But it hath been adjudged in a later case, that although a fine may be reversed as to part of the land, and remain good as to the residue, yet that it cannot be reversed *in toto* as to one person, and remain good *in toto* as to another. *Zouch v. Thompson*, 1 Ld. Raym. 179.]

If an infant brings a writ of error to reverse a fine for his nonage, and his nonage, after inspection, is recorded by the court; but before the fine reversed he levies another fine to another; this second fine shall hinder him from reversing the first, because the second having entirely barred him of any right to the land, must also deprive him of all remedies which could restore him to the land.

Ro. Abr. 788.

But, if tenant in tail levies an erroneous fine with proclamations, and then levies a second fine, which is also erroneous, and dies; if the issue in tail brings a writ of error to reverse the first fine, the defendant may plead in bar the second; for though there be error in the second, yet, till that appears judicially to the court, it must be looked upon as a fine duly levied, and, consequently, a bar to the plaintiff, because while the second stands in force he cannot have the land. But, if in this case the plaintiff brings a writ of error, to reverse the second fine, and the defendant pleads in bar the first fine, the plaintiff may reply upon the first writ of error, that the second fine was erroneous; and upon the second writ, that the first fine was erroneous, and so be relieved against both; for here the examination of both fines comes judicially before the court, and if there appears any error, the court

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will set them aside, and not suffer them to stand in the way of the plaintiff's right.

Ro. Abr. 788.

But in a writ of error to reverse a fine, the defendant cannot plead the same fine now endeavoured to be reversed and five years in bar of the writ of error, no more than in a writ of error to reverse an outlawry can that outlawry be pleaded in bar of the writ of error, *quia non valet exceptio istius rei, ejus petitur dissolutio*.

Raym. 461; Vent. 353; 2 Sid. 92, 93; 2 Jon. 181; Cro. Ja. 333; Ro. Rep. 36; 2 Buls. 244; 2 Inst. 518; Ld. Raym. 179.

If one that is sheriff of a county levies a fine, and the writ of covenant is directed to the coroner, this is no error, but the proper method, in order to prevent partiality.

Cro. Car. 415; Ro. Abr. 797.

A writ of covenant to levy a fine ran thus, *Præc' A quod teneat conventionem de octo messuag', duobus toftis, decem gardinis*, and the *dedimus potestatem* was pursuant to the writ of covenant, but the *præc'*, which was drawn up with the concord, was *de duobus messuag' pro duobus toftis*; but this was no error, because where the concord was pursuant to the *dedimus* and the writ of covenant, the *præcipe*, which seems to be but a copy of the writ of covenant on paper, is more than is needful, and therefore no material error.

Cro. Ja. 77; Ro. Abr. 794.

If the commissioners upon a *dedimus* return thus, *executio, istius commissionis patet in quodam pannello huic commission' annex'*, where the usual form is *in quadam schedulâ*; yet this is no error to avoid the fine, for whatever return certifies the conusance to be duly taken by the commissioners is sufficient; and therefore, if the commissioners certify the conusance under their seals, without any words, it is well enough. So, if the return had been made thus, *executio patet in hac annexâ*.

Cro. Ja. 77, 78; Ro. Abr. 794.

If a fine be levied, but the proclamations thereon be not duly or regularly made, the writ of error shall reverse only the proclamations; for where the proclamations are not all of them, or not duly, made, it is altogether the same as if they had never been made, and then the fine remains good at common law to work a discontinuance.

Dyer, 216, 182; Hughes's Abr. 938.

The court will not reverse a fine without a *seire facias* returned against the tertenants; for the conusees are but nominal persons; and though it was otherwise in the precedent in Co. Ent. and Hern's Plead. 375, and the law perhaps does not strictly require it, yet the course of the court does.

Salk. 339.

Fines may be avoided where they are obtained by fraud, covin, or disceit, though there be no error in the process; and that may be done either by writ of disceit or averment setting forth the fraud or covin.

Cro. Eliz. 471. [Doubts were entertained, soon after the Restoration, respecting the power of parliament to set aside a fine obtained by force and fraud. Lords' Journals, vol. 11, p. 191, 209; 12 Car. 2; Comm. Journ. vol. 8, p. 344; 13 & 14 Car. 2, c. 27; Cruise on Fines, 347.]

Thus, if a fine be levied of land in ancient demesne, the lord shall have

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a writ of *disceit* against the conusor and the tenant, and by that avoid the fine.

F. N. B. 98 a; Moore, 6; 2 Wils. 17. The reason why fines of ancient demesne lands must be levied in the lord's court is, because those lands were not originally within the jurisdiction of the courts of Westminster; and this privilege the tenants enjoy, not to be called from the business of the plough by any foreign litigation. But for this vide 4 Edw. 3, 4; Keilw. 43; Ro. Abr. 775; F. N. B. 98 a; Leon. 290; Cro. Eliz. 471; Bro. tit. *Fines*, 101; 9 H. 7, 12; Salk. 339.

If a fine be levied to secret uses to deceive a purchaser, and the conusor plead the fine in bar, the purchaser may aver the fraud in avoidance of the fine by 27 Eliz. c. 4, and such averment is not contrary to the record, because it admits the fine, but sets it aside for the covin and fraud in obtaining it.

3 Co. 80 a; Plow. 49 b.

So, if a fine be levied upon a usurious contract, it may be avoided by averment by 13 Eliz. c. 8, because being levied for ends the law has prohibited, will not encourage any evasion out of the act, nor suffer such usurious contracts to be supported by the solemn acts of the courts of justice against the intention of the statute.

3 Co. 80.

[By statute 23 Eliz. c. 3, § 2. "No fine shall be reversed for false or incongruous Latin, rasure, interlining, mis-entering of any warrant of attorney, or of any proclamation, mis-returning or not returning of the sheriff, or other want of form in words and not in matter of substance."

By statute 10 & 11 W. 3, c. 14, a writ of error to reverse a fine must be brought and prosecuted with effect within 20 years after the fine levied.

A writ of error can only be brought to reverse a judgment in a court of record; for to amend errors in a base court, which is not of record, a writ of false judgment lies, returnable in the Court of Common Pleas.

Co. Litt. 288 b.

A writ of error, properly speaking, is a proceeding in the nature of an appeal; it is therefore usually brought to reverse a fine in the Court of King's Bench, that court having an appellate jurisdiction over the Court of Common Pleas. But, where the error assigned in the judgment doth not arise from any fault in the court, but from some defect in the execution of the process, or from some matter of fact, the writ of error must be brought in the same court where the judgment was given; in cases of this kind, therefore, in the Court of Common Pleas.

F. N. B. 21; 9 Vin. Abr. 486.

During the term in which a judicial act is done, the record may be amended or invalidated without a writ of error; because, during the term, the record is in the breast of the court, and the rolls are alterable at the discretion of the judges. And now the courts of justice will allow amendments to be made at any time while the suit is depending, notwithstanding the record be made up, and the term be past; for they consider the proceedings as in *feri* until the judgment is given.

Co. Litt. 260 a; 3 Bl. Com. 407.

As to the amendment of fines, the Court of Common Pleas has frequently permitted it, where any palpable mistake or misprision has been made by the officers of the court, in the entry of the king's silver, (a) the

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proclamations,(b) or the description of the lands ; (c) and this even after error brought upon the very point.]

(a) *Bohun's case*, 5 Co. 43. (b) *Dowling's case*, Ibid. 44. (c) 1 Ld. Raym. 209 ; Pig. Recov. 218 ; Cas. of Pr. 52 ; Barnes, 216, 24 ; 3 Wils. 58.

|| The deed of uses is the measure by which juries usually go in ascertaining the description of the estates whereof a fine is levied ; and the courts are in the habit of directing the fine to be amended as to the parcels by such deed, though it be of a later date than the fine, as is generally the case, where it is to *declare* the uses.

1 Ld. Raym. 209 ; 4 Taunt. 257 ; 6 Taunt. 73 ; 1 Marsh. 452, S. C. ; 6 Taunt. 276.

Where from the length of time which had elapsed it had become impossible to swear that certain out-lying parcels, situated in a different parish from the rest of the estate, were intended to pass by the fine, the court permitted the name of that parish to be inserted in the fine, upon seeing that the whole was comprised in the deed of uses.

*Gladwyn v. Brown*, 2 Taunt. 1.

Though the deed of uses do not itself immediately ascertain the parcels intended to pass by the fine, yet, if it refer to another instrument through which they can be ascertained, the court will permit the insertion of any parts that may appear to be omitted.

*Gill v. Yeates*, 4 Taunt. 708.

Though the deed of uses describe the land as being in a parish in which it is not, yet if it be clear from the other parts of the description of the land that it was intended to pass, the fine will be amended by inserting the name of the proper parish.

*Lambe v. Reaston*, a ; 5 Taunt. 207 ; 1 Marsh. 23, S. C.

And where two fines of different shares in the same lands stated them to be situated in "the parish of A," instead of "A," there being no such parish ; the court permitted them to be amended ; the deed to lead the uses of the first fine being correct ; though that of the last had the same mistake with the fines.

*Shelly v. Johnson*, 1 Marsh. 519 ; *Payne v. Garrick*, Ibid. 468, S. C.

Though the deed of uses had been lost, yet a fine of premises described as being in "the town of Kingston upon Hull," was amended by prefixing the words "the lordship of Myton in the county of," upon an affidavit that they had been so described in the deed.

*Frost v. Hales*, 2 Marsh. 391.

It is said that a fine will not pass a greater number of acres than are contained in the writ and concord, although the deed of uses mentions more ; for the fine is the foundation of the estate, and the estate ought to rise out of it.

*Jenk. Cent.* 254.

There are cases however to the contrary. In 6 Co. 67, it is stated to have been adjudged in *Sir John Bruyn's case*, in the beginning of the reign of Elizabeth, that in a common recovery (which is had by agreement and consent of the parties) of acres of land, they shall be accounted according to the customary and usual measure of the country, and not according to the statute *de terris mensurandis*, 33 E. 1. In 12 Vin. Abr. tit. *Evidence* (T. b. 82) there is this passage : "On trial in the north, whether the lands were comprised in a common recovery or not ; being, as described, but 28 acres, yet



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the fact was they were 120 acres; yet *bene*, because the intent of the party is what is to govern in these cases, and these 28 acres shall not go according to statute, but the estimation of the parties. *Per King, Chan. Tr. Vac. 1727.* And in *Eyton v. Eyton*, 1 Br. P. C. 151, it was argued on the part of the defendant (and the argument seems to have prevailed) that the deed of uses, and not the fine and recovery, was the measure by which the jury are governed.

1 Prest. Convey. 272.

From the above cases, we may collect, that the rule now is to amend the recovery by the deed of uses, when the lands are described in it by name, or it was evidently the intention of the parties to comprehend them. (a)

1 Prest. Convey. 273. (a) It is essential that the lands should be included in it, either by special designation, or by general words. *Pearson v. Broughman*, 1 H. Bl. 73.

An affidavit is required of the intention to include the parcels, which are omitted out of the fine, &c., unless there be a manifest intention disclosed by the deed to include the parcels in question. Under such circumstances of intention it would seem the affidavit will be dispensed with, when by reason of the death of the parties it cannot be made. (a) At least an affidavit of the belief of an intention to comprise the parcels will be sufficient.

*Wheeler v. Heseltine*, 2 Bos. & Pull. 560; *Dowse v. Reeve*, *Ibid.* 578. (a) *Milbanke v. Jolliffe*, *Ibid.* 586, *in notis*; *Loggin v. Pullen*, *Barnes*, 21.

In one case, the court hesitated to allow the number of acres in a fine to be increased, upon the mere circumstance that the quantity in the deed of uses was greater than in the fine, it not being sought to insert additional parcels omitted to be specified, and passing only by the general words, but all the closes being enumerated in the deed, and the quantity only understated in the fine.

*Stone v. Ashby*, 5 Taunt. 616.

It has been holden, that in a fine levied by husband and wife, the number of acres cannot be increased where the deed of uses is general. The reason assigned by De Grey, C. J., was, that the wife is not examined to the deed as she is to the fine, (b) all the parcels in which should be distinctly named to her. But Blackstone, J., thought the deed of uses had always been allowed as sufficient evidence of the intention of the parties, even in the case of feme covert; and he referred to *Loggins v. Rawlins*, *Barnes*, 21, and *Craghill v. Pattinson*, *Ibid.* 24. He concurred with the rest of the court in refusing the amendment, because he considered the attempt to increase the number of acres by subsequent *vivâ voce* evidence as an inlet to fraud. In a late case of a recovery suffered by husband and wife, where the several closes were all mentioned in the deed and recovery, but were stated to be of less quantities, than from a subsequent admeasurement they were found actually to be, the additional number was allowed to be inserted, though there were no general words to aid the amendment. And upon this occasion the case of *Powel v. Peach* was cited as an authority for the amendment.

*Powell v. Peach*, 2 Bl. Rep. 1202. (b) *Qui*. This reason. *Alexander v. Hanford*, 4 Taunt. 734.

Where a fine was passed of thirty acres of land, twelve acres of meadow, and twenty-five acres of pasture; but the deed of uses conveyed a close, without describing its quality, but which was pasture containing twenty-

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five acres and a fraction, and another close described as meadow containing nine acres and a fraction, so that the entire quantity of the estate was in fact greater by five acres and a fraction than the quantity comprised in the fine under the name of land, and the quantity which in fact was pasture was greater by a fraction than the quantity comprised in the fine under that name; the court refused to amend the fine by increasing the quantity of each species of land, so as to make each cover the whole quantity intended to be conveyed.

*Bartram v. Towne*, 6 Taunt. 58; 1 Marsh. 446, S. C.

Where the deed of uses purported to convey lands situated in the parishes of S. & S., in the island of F., and the fine comprised lands in S. & S., in the island of F.; though there was an affidavit that these lands were in the parish of F. in the same island, the court refused to amend the fine by inserting the parish of F.

*Cotterel v. Franklin*, 6 Taunt. 284.

But a fine of lands in the parish of F., which is no parish but the popular name of a district containing two parishes, viz., F. St. M., & F. St. N., was amended by substituting these two parishes by name. The description was the same in the deed of uses as in the fine.

*Blake v. Pooley*, 5 Taunt. 624.

|| Where one of sixteen cognisors in a fine signed her name E. P. B., whereas her name was E. B., the court would not, upon affidavit of identity that the mistake was not discovered till after execution, and that one of the sixteen cognisors was dead, allow the fine to pass as to E. B.

*Parker demandant v. Parker tenant*, 4 Bing. 79; and see *Ibid.* 104.

An affidavit of the caption of a fine taken before a consul abroad is insufficient.

4 Bing. 606. See 2 Taunt. 313; 2 New R. 57; 1 Taunt. 144.

Fine permitted to pass as of a term, twenty-two years previous, upon payment of the king's silver, all surviving parties interested consenting, on its being shown that, unknown to the parties, the clerk instructed to pass it had absconded with the money intrusted to him for payment of the king's silver, when that payment alone was wanting to complete the fine.

6 Bing. 275.

A fine may, at law, be impeached for fraud, and in matters of fraud equity has concurrent jurisdiction.

2 Ball & B. 272.

By the late act, 1 W. 4, c. 70, § 27, abolishing the judicatures of Wales and Chester, the court shall have the same power of amending fines and recoveries passed theretofore in any of the courts abolished by that act, as if the same had been levied, suffered, or had in the Court of Common Pleas.||

If one of the deeds of uses, viz., the lease, contain the word "tithes," but it be omitted in the other deed, viz., the release, the court will not amend the writ of entry by inserting that word, though the release has the words, "and also all houses, ways, &c., hereditaments and appurtenances whatsoever to the said messuages, lands, &c., belonging or in anywise appertaining;" for the lease does not convey all the hereditaments described in the lease, but only the hereditament belonging to the messuages and lands before described in the release itself; and tithes are not hereditaments belonging to

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land, but are a separate subject of tenure, and must be holden by a different title.

Phillips v. Jones, 3 Bos. & Pull. 362. Vide Corden v. Coelough, 2 N. R. 431; Dowse v. Reeve, Ibid. 578; Garle v. Mason, 2 Marsh. 194; Ross v. Worge, Ibid. 195.

The deed of uses is not a sufficient authority upon which to make an amendment without an affidavit connecting it with the fine, stating that it is the deed in pursuance of which the fine was levied.

Fawcett v. Lowe, 6 Taunt. 432.||

Where a fine is recorded of one term, the court will not alter it, and make it a fine of another. || Nor will it transfer a writ of covenant from one county to another, nor transpose parishes from one county to another.

Heath v. Sir I. E. Wilmot, 2 Bl. Rep. 788; Gill v. Yeates, 4 Taunt. 708.

The court has refused to allow a change of the Christian names of the parties, where no deed of uses had been executed; and where there was a deed to warrant the amendment,<sup>(a)</sup> it reluctantly assented to it.

Dixon v. Lawson, 2 Bl. Rep. 816. <sup>(a)</sup> Grey v. Wainwright, 1 Marsh. 678.

An alteration in the surnames of the deforciant it has peremptorily refused, though it was sworn that a wrong name was inserted by mistake.

*Ex parte* Motley, 2 Bos. & Pull. 455.||

[The judges have, in some instances,<sup>(b)</sup> directed the original writ upon which a fine has been levied to be amended; but the propriety of such amendments seems, from some modern determinations,<sup>(c)</sup> to be extremely doubtful.

<sup>(b)</sup> Gage's case, 5 Co. 45 b. <sup>(c)</sup> Lord Pembroke v. Lord Jeffries, 1 Salk. 52; 2 Ld. Raym. 1066. But they are still in the habit of allowing them.

In one case, the Court of Common Pleas refused to amend the return of a writ of covenant on which a fine had been levied, because the deed of uses was suspicious, the fine having been taken from a dying woman. But Sir William Blackstone observes, that the court gave no opinion as to the propriety of such an amendment in a fair case.

Lindsay v. Gray, 2 Bl. Rep. 1013.]

|| It not being allowed to combine two operations in one fine, where certain lands in possession, and others in reversion were included in the same fine, the court permitted it to be amended *in fieri* by striking out the last.

Seymour v. Barker, 2 Taunt. 198; Moor v. Sharpe, 5 Taunt. 631.||

[By the statute 23 Eliz. c. 3, § 10, it is enacted, That no fine levied before that act, which shall be exemplified under the great seal, shall, after such exemplification, be in anywise amended. And by the statute 27 Eliz. c. 9, § 10, no fine levied before that act, which shall be exemplified under any judicial seal of any of the shires of Wales, or the town or county of Haverfordwest, or under the seal of any of the counties palatine, shall, after such exemplification, be in anywise amended.]

## FINES AND RECOVERIES.

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A RECOVERY, in a large sense, is a restitution to a former right by solemn judgment; and judgments, whether obtained after a real defence made by the tenant to the writ, or whether pronounced upon his default or feint plea, had the same efficacy and force to bind the right of the land in question. This was the notion of the common law; and hence men took an opportunity of making use of the decisions of the court to their own advantage, and to the prejudice of others, who, though in some cases strangers to the action, yet were interested in the land for which it was brought.

2 Inst. 75, 429; 1 Bur. Rep. 115; 5 T. R. 107; but particularly Cruise on Recoveries. See also Willes, 452.

For whilst these recoveries were governed by the strict rules of the common law, particular tenants, as tenant in dower, curtesy, in tail after possibility of issue extinct, and for life only; also, those who had made leases for years, and those whose wives were entitled to dower, often took advantage of them, and by selling the lands, and suffering their purchasers to recover them, thereby defeated the right of those in remainder or reversion, &c., which were inconveniences so great, that it was thought necessary to provide against them by (a) positive laws.

Vide Co. Lit. 104; Kel. 109; 2 Inst. 321; Bro. 69; F. N. B. 468; Plow. 57. (a) As Westm. 2, c. 3, which makes provision for him in reversion, against the recoveries suffered either by the tenant in dower, by the curtesy, or in tail, after possibility of issue extinct, or for life; and by c. 4, of this statute, the wife is secured as to her dower; and the statutes of Gloucester, c. 11, and the 7 H. 8, c. 4, and 21 H. 8, c. 15, have established the right of termors, and enabled them to falsify such recoveries. Vide Doctor and Student, 45.

But there is no express provision made by any statute to preserve the interest of the issue in tail, or of him in reversion, against a recovery suffered by the donee; yet it seems to have been for two hundred years after the making of the statute *de donis*, that they were protected by that statute; and therefore we find no express resolution, where such recovery was allowed to bar the issue in tail, or those in remainder or reversion, till the reigns of Ed. 4, and H. 7, though in some cases the donee in tail was allowed to (b) charge the entail, and even to (c) bar it.

(b) Thus in the case of Octavian Lombard, in the 44 Ed. 3, it was adjudged, that the donee in tail of the gift of the disseisor may grant a rent-charge to the disseisee, in consideration of a release of all his right, and the issue in tail bound by the grant. Ro. Abr. 342; Co. Lit. 343; 10 Co. 37; Plow. 436. (c) A lineal warranty with assets has been always allowed as a sufficient bar. 2 Inst. 335; Co. Lit. 374; 4 Leon. 132, 133. But the first case we find in which it was attempted to bar the issue in tail by a recovery, is Taltarum's case, which vide 12 Ed. 4, f. 19. Vide head of *Estates-tail*.

When these recoveries were established as a common conveyance, as the best and securest way of barring the issue in tail, and those in reversion or remainder, the tenant for life began to apply them once more to the prejudice of those who had the inheritance; and though the former statutes gave those who had the inheritance a remedy, yet the provision made by them being tedious and expensive, it was thought proper to make the 32 H. 8, c. 31, which declares such covinous recoveries against the particular tenants to be

void in respect to him in reversion or remainder; and though the judges very reasonably determined recoveries against that act to be not only void, but a forfeiture of the particular estate, because it was a manner of conveyance as much known at that time as a fine or feoffment, and therefore by parity of reason ought to have the same effect and operation; yet that statute did not fully answer the end for which it was made.

Co. Lit. 356 a; Co. 15; Vaugh. 51.

For if A had been tenant for life, and made a lease for years to B, and B had made a feoffment in fee, if the feoffee had suffered a recovery, and vouched the tenant for life, this was no void recovery within the statute; because A the tenant for life was not seised at the time of the recovery; for the feoffment of the termor was a disseisin to A, and him in reversion; and the statute makes recoveries of tenants for life in possession only void against them to whom the reversion then belongs.

10 Co. 45 a; Co. Lit. 362.

Yet, where tenant for life bargained and sold his land in fee by indenture enrolled, and the bargainee suffered a recovery, and vouched the bargainor; this was a void recovery, and a (a) forfeiture within the 32 H. 8, c. 31; for though the bargain and sale was of the inheritance, yet it passed only an estate for life of the bargainor, which was the greatest estate he could lawfully pass, and, consequently, the reversioner was not divested; and therefore the bargainee being a legal tenant for life in possession, the recovery against him, though with a voucher of the bargainor, was void within that act against him in reversion, whose reversion was not turned to a right, as in the former case of a disseisin.

Co. 15, Pelham's case; Leon. 123, S. C. (a) And it has been since holden, that if tenant for life bargains and sells, and suffers a recovery by coming in as vouchee, though afterwards he should reverse that recovery for want of an original, yet it is a forfeiture of his estate. Sid. 90.

But the former defect was cured by 14 Eliz. c. 8, which declares all recoveries (had by agreement of the parties or by covin) against tenant for life, of any lands whereof he is so seised, or against any other with voucher over of him, to be void, as against the reversioners and their heirs.

These statutes made no provision for reversions or remainders expectant on estates-tail; and therefore if there be tenant for life, remainder in tail, remainder in fee, and the tenant for life suffer a recovery, and vouch the remainder-man in tail, who vouches the common vouchee; this is so far from being a void recovery within those statutes, that the reversion in fee is actually barred by it; for the intended recompense, which the remainder-man in tail is to have against the common vouchee, is to go in succession, as the estate-tail would have done: and it cannot be a covinous recovery within the act, because the remainder-man in tail joined in it, who may at any time suffer such a recovery to destroy the remainder in fee.

10 Co. 39 b, 45, Jennings's case; Co. Lit. 362 a; 3 Co. 60 b; Cro. Eliz. 562; Wiseman and Crow, Moore, 690; Cro. Eliz. 570. [A tenant for years, remainder to B for life, remainder to the first and other sons of B in tail, remainder to B in tail; A and B join in a lease and release, to make a tenant to the *præcipe*, and suffer a recovery. It was holden that the estate-tail to the sons of B was not divested by the recovery, nor did A and B incur any forfeiture of their respective estates: whether A had forfeited or not, it was immaterial to consider, as there was no one to take advantage of it but B; and B had a remainder in tail subsequent to that limited to his sons; upon which the recovery might lawfully operate: and the recompense in value could not go to the sons, because their estate-tail preceded that of which the recovery was suffered: such estate,

## (A) Who may suffer a Recovery.

therefore, could not be displaced, or in any manner affected by the recovery. *Smith v. Clifford*, 1 T. R. 738.]

These common recoveries were no sooner allowed by the judges to bar estate-tail, but men began to improve them into a common way of conveyance, and to declare uses upon them, as upon fines and feoffments. Hence it is, that the statutes, which provide against any alienations or discontinuances of particular tenants, provide at the same time against their recoveries. Thus 11 H. 7, c. 20, declares all recoveries, as well as other discontinuances by fine or feoffment of women tenants in tail, of the gift of their husbands, or their ancestors, to be void. So, a recovery against husband and wife of the inheritance of the wife, without any voucher, is declared to be void within 32 H. 8, c. 28, though the statute says, suffered or done by the husband; for this, like a feoffment by baron and feme, in substance is the act of the baron only, and so within the statute. But a common recovery suffered by the feme covert, where her husband joins with her, is good to bar her and her heirs.

Doct. & Student, 54; Co. Lit. 326 a; 8 Co. 72; 2 Inst. 342; 2 Ro. Abr. 295; 10 Co. 43.

Under this head, we will consider

(A) Who may suffer a Recovery.

(B) Of what Things a Recovery may be suffered, and by what Names.

(C) What Estates and Interests must be barred by a common Recovery: And herein of the single and double Voucher.

(D) Of erroneous and void Recoveries; who may avoid them, and by what Method.

## (A) Who may suffer a Recovery.

WHEN recoveries were improved into a common way of conveyance, it was thought reasonable that those, whom the law had judged incapable to act for their own interest, should not be bound by the judgment given in recoveries, though it was the solemn act of the court; for where the defendant gives way to the judgment, it is as much his voluntary act and conveyance, as if he had transferred the land by livery, or any other act *in pais*; and therefore if an infant suffers a recovery, he may reverse it, as he may a fine by writ of error during his minority. And this was formerly taken for law, as well where the infant appeared by guardian, as by attorney, or in person. But now the distinction turns on this point, that if an infant suffers a recovery in person it is erroneous, and he may reverse it by writ of error. But even in this case the writ of error must be brought during his minority, that his infancy may be tried by the inspection of the court, for at this full age it becomes obligatory and unavoidable. But in some instances, the court has admitted the infant to appear by guardian, and to suffer a recovery, or come in as vouchee; but this is seldom allowed, and only upon emergencies, when it tends to the improvement of the infant's affairs, or when lands of equal value have been settled on him. And recoveries suffered in this manner have been rather allowed, because if they be to the prejudice of the infant, he has remedy for it against his guardian, and may reimburse himself out of his pocket, to whom the law hath committed the care of him.

Bulst. 235; 2 Ro. Abr. 395; Co. Lit. 381 b; 10 Co. 43; Ro. Abr. 731, 742; Sid. 321, 322; Lev. 142; 2 Sand. 94; Cro. Eliz. 471; Hob. 196; Cro. Car. 307; 5 Mod. 209; Mes. 10 Co. 43, and 2 Ro. Abr. 395, *cont.* vide 2 Salk. 567, where J S being of the age of nineteen years, his sister, who was next in remainder, and also his heir, mar-

## (A) Who may suffer a Recovery.

ried one of his footmen, and he petitioned the king for leave to suffer a recovery, who referred it to the judges of the Common Pleas, before whom several precedents suffered by infants on privy seals were produced; but the judges, observing that most of them were on the petitions of their fathers on their sons' marriage, and an equal recompense given, and that there was no such consideration in this case, refused; but for this vide the above authorities, and Vern. 461. [Common recoveries suffered by privy seal are now disused, and private acts of parliament are universally substituted in their stead. Cruise on Recov. 184. For notwithstanding the precautions of the judges, recoveries suffered in that manner might be reversed by writ of error. Cro. Car. 397; 1 Mod. 48.]

If an infant suffers a recovery, and appears by attorney, it seems he may reverse it after his full age; for here it may be discovered, whether he was within age when the recovery was suffered, because it may be tried *per pais*, whether the warrant of attorney was made by him when he was an infant.

Sid. 321; Lev. 142, *qu*.

[When, therefore, an infant is to suffer a recovery, he must make a tenant to the *præcipe* by feoffment, and give livery of seisin in person, by which means the feoffment is only voidable; whereas if the infant appointed an attorney to give livery of seisin for him, the feoffment would be absolutely void.

Perk. 12; 3 Burr. 1804.

An infant trustee may join in a common recovery, in consequence of the statute 7 Ann. c. 19, if he is directed to do so by the Court of Chancery.

*Ex parte Johnson*, 3 Atk. 559.

The king cannot suffer a common recovery, for if he does, he must either be tenant or vouchee; and in both cases the demandant must count against him, which the law does not allow.

Fig. 74; Plowd. 244; Cro. Car. 96.

Idiots, lunatics, and generally all persons of non-sane memory, are disabled from suffering common recoveries, as well as from levying fines; though if an idiot or lunatic does suffer a common recovery, and appears in person, no averment can afterwards be made that he was an idiot or lunatic. But, if he appears by attorney, it seems that such an averment would be admitted, upon the same principle that an averment of infancy may be made against a warrant of attorney, acknowledged by an infant for the purpose of suffering a common recovery, as the fact of idiocy may be tried by a jury with as much propriety as the fact of infancy.

Cruise on Recov. 185.

In a celebrated case which was lately determined by the House of Lords of Ireland, the majority of the judges were of opinion, that the caption of a warrant of attorney, taken by the chief justice of the Court of Common Pleas for the purpose of suffering a common recovery, was not conclusive evidence of the capacity of the person acknowledging such a warrant of attorney.

*Hume v. Burton*, Cruise on Recov. Append.

Although no averment of idiocy or lunacy can be made against a recovery, where the parties appear in person, yet evidence of weakness of understanding has been admitted to invalidate a deed to make a tenant to the *præcipe* for suffering a recovery; and the recovery has in that manner been set aside.

2 Ves. 403; 3 Atk. 313; *Jones v. Cave*, Hereford Lent Assizes, 1765, *coram* Sir I. E. Wilmot. Cruise on Recov. § 303.]

A recovery, as well as a fine by a feme covert, is good to bar her; because the *præcipe* in the recovery answers the writ of covenant in the

(B) Of what Things a Recovery may be suffered, &c.

fine to bring her into court, where the examination (a) of the judges destroys the presumption of law, that this is done by the coercion of her husband, for then it is presumed they would have refused her.

10 Co. 43 a; 2 Ro. Abr. 395. (a) || But it is not merely by the examination that the fine or recovery has its efficacy in this case. The Court of Common Pleas cannot by the consent of a married woman, upon examination, give effect to her conveyance by lease and release. Fines were always binding upon married women, though it was thought proper to make them liable to examination by st. 18 E. 1, c. 4, *De modo levandi fines*. Fines and recoveries had their origin from real suits for the recovery of land. Though they are now merely modes of conveyance, the forms are still preserved; and the principles are kept entire. A title is asserted paramount to that of the married woman. Upon a fine, the existence of that title is recognised by an agreement after suit; and, upon a recovery, by judgment of the court upon default of the party. It is upon technical principles, and under the cover of these forms, that she is permitted to part with her estate, without a direct violation of the rule of law denying her any disposing power. 10 Ves. 587, 588.||

|| Equitable tenant in tail aliens in fee by way of mortgage, a good equitable recovery may be suffered of the secondary equitable estate without the concurrence of the mortgagee.

Norraile v. Greenwood, 1 Turn. & R. 26.

First tenant in tail under a will, before suffering a recovery, settles the estate on himself for life, with remainder to other tenant in tail in remainder under the will, and afterwards suffers a recovery and mortgages the estate; held valid against tenants in tail in remainder.

Cornick v. Trapaud, 6 Dow R. 60.

Trustee to preserve contingent remainders joining in a recovery with the remainder-man in tail, having attained twenty-one, held no breach of trust, and no objection to a specific performance.

Biscoe v. Perkins, 1 Ves. & B. 485.||

(B) Of what Things a Recovery may be suffered, and by what Means.

[A COMMON recovery may be suffered of all things whereof a writ of covenant may be brought for the purpose of levying a fine, as of an honour, barony, castle, messuage, curtilage, land, meadow, pasture, underwood, warren, furze, heath, moor, &c. And in general a common recovery may be suffered of any thing whereof a writ of entry *sur disseisin*, or any other writ of entry will lie.

Cruise on Recov. 163.

In consequence of the statute 32 Hen. 8, c. 7, § 7, a common recovery may now be suffered of every kind of ecclesiastical or spiritual profits, as of tithes, oblations, portions, pensions, &c.

It was determined in Dormer's case, that a common recovery might be suffered of an advowson in gross, upon a writ of entry. Mr. Pigott says, that this must be understood of an advowson appendant to a manor, but could not be of an advowson in gross, since the parson has the freehold; and therefore it ought not to be by writ of entry *en le post*, but by writ of right of advowson.

5 Co. 40; Poph. 22, S.

A common recovery may, however, be suffered of an advowson in gross, and a small quantity of land on a writ of entry *sur disseisin*.

Bayley v. University of Oxford, 2 Wils. 116.

A recovery may be suffered of a rent-charge issuing out of lands; but not of an annuity which is charged only on personal estate.

Pig. 97. Vide Turner v. Turner, 1 Br. Ch. Rep. 316.



(B) Of what Things a Recovery may be suffered, &c.

It is said in Pigot and Viner, that a common recovery cannot be suffered of a fishery, common of pasture, estovers, services to be done, nor of a quarry, a mine, or market, for they are not in demesne, but profit only. Pig. 96; 18 Vin. Abr. 218.]

Recoveries being now settled as common assurances to establish men in their purchases, are very much favoured by the judges, and not compared to judgments in other real actions or adversary suits.

2 Inst. 353; Poph. 22, 23; 2 Vent. 32; Cowp. 346. Hence it is, that though the statute of Westminster 2 c. 5, says, *non sint nisi tria brevia originalia* for the recovery of advowsons; yet a writ of entry in the *post*, has been admitted for an advowson in gross, because this being the original writ in these common recoveries, which are suffered by the consent of parties, the judges have allowed advowsons as well as rents, and other incorporeal inheritances, to pass by recoveries, *quia consensus partium tollit errorem*; so it is of commons in gross; and if this should not be allowed, there would be no method of barring the remainder or reversions attending upon estates-tail, which the tenant in tail in every other case has a power over. 5 Co. 40, Dormer's case.

If a man be seised of a reputed manor, which really is no manor, and he suffer a common recovery of this by the name of a manor, this is a good recovery of the lands which constituted the reputed manor; though strictly speaking there is no manor recovered; because the law supports this, as all other conveyances, according to the intention of the parties; for it would be severe to vacate this conveyance, when the purchaser recovered the lands by the assent of the vendor under such a denomination.

2 Ro. Abr. 396; 6 Co. 64; 2 Ro. Rep. 67; 2 Vent. 32: S. P. vide Cro. Eliz. 524, 707, and Keb. 591, 691, *cont.*

So, if a recovery be suffered of a manor with its appurtenances, lands which have been reputed parcel of the manor shall pass; for it is but equitable, *quod voluntas domini volentis rem suam in alium transferre rata habeatur*. And though the recovery does not mention the lands reputed parcel of the manor, but only the manor itself, yet this may be supplied by the indenture, if that be of the manor and all lands reputed parcel thereof, though occupied together but two years.

Sid. 190; Lev. 27; Keb. 591, 691; 2 Mod. 235, S. C., between Thynn and Thynn; and note, that in all the books which report this case, it is said, that as to Sir Moyle Finch's case, (which vide 6 Co. 63,) all the judges of England gave their opinions under their hands, that the lands in reputation, belonging to that manor, should not pass; but that Coke, after he was made chief justice, got it adjudged otherwise, and so it hath been holden ever since; and well it was that it was so adjudged, because many settlements depend thereon.

If a man having a third part of a manor, suffers a recovery of a moiety of the manor, this is good to pass his interest in the third part; for where the words of a conveyance (which a recovery is agreed to be) contain more than the grantor can convey, it would be an unreasonable interpretation to make this void and entirely useless, when they are sufficient to convey so much as he might lawfully pass. So, if the recovery had been in this case of the third part of the manor, by the name of the moiety, part and purparty of the manor, this had been good for the whole third part, and not only for a moiety of the third part.

Cro. Car. 109, 110, *Isam v. Morris*.

In ejectment a special verdict was found, that there was a parish of Ribton, and the vill of Ribton, but the latter not of equal extent with the former; and that J S was seised of land in tail in the parish, but not in the vill; and bargained and sold the land in the parish of Ribton, with covenant to levy a fine, and suffer a recovery to the uses in the deed; but

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the fine and recovery were only of the lands in Ribton. The question was, whether this recovery would serve for the said land in the parish of Ribton. And though it was objected, that where a place was named in a record, and no more said, it is always intended a vill; and, consequently, that in this case, the fine and recovery being of lands in Ribton, shall pass only the lands in the vill of Ribton; and though it was further urged, that it was dangerous to extend the recovery farther than the words of the record, because the deed declares the intention of the parties to pass the lands in the parish, inasmuch as by such construction no man could tell what was conveyed by fines and recoveries, but must for greater certainty have recourse to a pocket-deed; yet the court in favour of common recoveries, extended this recovery to the lands in the parish of Ribton; and the rather in this case, because the verdict found, that he that suffered the recovery had no lands in the vill, and, consequently, that the recovery must be void if not extended to the parish; and though parishes are not so ancient as vills, and therefore till lately were never inserted in writs, yet now they are, and the law takes notice of them.

2 Vent. 31, 32, Sir John Otwaye's case; 3 Keb. 277; Mod. 250, and 2 Mod. 233, S. C.; 3 Keb. 771. But for this vide Hutt. 105; Godb. 440; Cro. Car. 269, 276; 2 Ro. Abr. 20; Cro. Ja. 574, 120; Mod. 206; 2 Mod. 47; 8 Mod. 276; Vent. 143, 170; Mod. 78; 2 Keb. 802, 821, 848; Owen, 60, and 2 Mod. 236; Stock v. Fox, which seems against this case, but is reconcilable with this diversity, that in those cases there were lands upon which the fine might operate, viz. the lands in the vill of Street, without taking in the parish of Street to carry the lands in Walton, a vill of that parish; but here, if those in the parish should not pass, there were no others to pass.

[As to what shall be a sufficient description in a common recovery, see further the case of Massey v. Rice.]

Cowp. 346.

(C) What Estates and Interests may be barred by a common Recovery: And herein of the Single and Double Voucher.

IN respect to estates tail and the barring of them by recovery, what is principally to be regarded is, that there must be a legal tenant to the *precipe* at the time of the writ purchased, or at the return; for estates tail are only barred on account of the intended recompense which is to follow the descent of the tail, where there happens to be no tenant to the *precipe*, the demandant can really recover nothing; and, consequently, the supposed tenant can have no recompense in value against his vouchee, for that is only given against the vouchee in consideration of what the tenant lost. Hob. 262.

As, if there be tenant for life, the remainder in tail, the remainder in fee; and the tenant for life, with the remainder in tail, suffer a recovery, with voucher over; this shall not bar the remainder in tail, nor the remainder in fee; because the remainder-man in tail was not tenant to the *precipe*, and, consequently, could not have the intended recompense, because that was given in lieu of the estate recovered, which was no greater than the estate for life, the tenant for life only being legal tenant to the *precipe*.

2 Ro. Abr. 395; Dyer, 252; Cro. Eliz. 670; Moore, 255. But here we must observe a difference between the tenant in tail and in fee-simple; for if tenant in fee-simple be disseised, and after a disseisin suffer a common recovery, this is good by the way of estoppel against the disseisee, his heirs and assigns; for they shall not be admitted, against their own act on record, to vacate the recovery; nor can the recoverer have any thing; because the tenant to the *precipe* was out of possession, and consequently, had nothing to lose. But, if in this case J S disseise the disseisor, the recoverer may enter upon J S, because the recovery gave him a right against all persons, but the first disseisor, his heirs or assigns; and therefore, since J S did not claim from the first

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disseisor, he could not withstand the entry of the recoveror. But, where tenant in tail suffers a recovery, being out of possession, this is no bar nor estoppel to the issue, because the statute *de donis* preserves the entail for the issue against all acts of the ancestor, and a common recovery is allowed to dock the entail on account of the intended recompense, which is wanting in this case; because where the tenant in tail is not seised at the time of the recovery he can lose nothing, and, consequently, can have no recompense over. *Bull v. Wyatt*, Cro. Car. 388; Ro. Abr. tit. *Estoppel* (E) 3; || *Webb v. Nect*, Cro. El. 21; Lord Say and Sele's case, 10 Mod. 45. But the recovery suffered in this case by the tenant in tail is not void, but only voidable. It is binding on the tenant in tail himself; and though not binding on the issue by estoppel, yet, till regularly avoided by them, it is good, so as to govern the legal title to the freehold. See Mr. Preston's observations on this point in his *Practice of Conveyancing*, vol. i. p. 86—102.]

[On a writ of error to reverse a common recovery, the error assigned was, that the tenant to the *præcipe* had not acquired the freehold until after the *teste* of the writ of *summoneas ad warrantizandum*, so that he was not seised of the freehold at the return of the writ of entry: but the court held it to be sufficient, if he acquires the freehold at any time before judgment is given. And if he has it when judgment is given, (a) although the estate be afterwards defeated, yet the recovery will be good.

*Lacy v. Williams*, 2 Salk. 568; 1 Ld. Raym. 222, 475; Carth. 372. (a) *Anon.* 4 Leon. 84; Goldsb. 82.

Although a person has acquired the freehold by disseisin, yet he will be a good tenant to the *præcipe*; and in all cases where the validity of a common recovery is contested, the court will suppose that there was a good tenant to the *præcipe*, if nothing appears to the contrary.

*Lincoln College case*, 3 Rep. 58; *Griffin v. Stanhope*, Cro. Ja. 454.

If a writ of entry is brought against the tenant of the freehold and a stranger, the recovery will be valid; for the recompense in value will go to the person who has really lost the estate.

1 Vent. 358; *Paulin v. Hardy*, Skin. 3, 63; Touchst. 41.

If there are two jointenants of a manor, and a writ of entry of the whole manor is brought against one of them, on which a common recovery is suffered, it will be only good for the moiety of the person against whom the writ was brought; but as to the other moiety, it will be void for want of a tenant to the *præcipe*.

*Marquis of Winchester's case*, 3 Co. 1.

As it is absolutely necessary that the tenant to the *præcipe* should have an estate of freehold, it follows, that no person who has not an estate of freehold can of himself suffer a common recovery, because he cannot convey a freehold to the person against whom the writ is to be brought.

1 Keb. 735, 785; 3 Atk. 135; 4 Br. P. C. 405.

It has been long settled, that a devise to executors for payment of debts, and until debts are paid, only gives the executors a chattel interest in lands thus devised, and therefore does not prevent the disposal or descent of the freehold; so that if after such a devise the testator gives the same lands to a person for life, the freehold will vest in such devisee immediately on the death of the testator, and he will be enabled to make a good tenant to the *præcipe*.

Co. Litt. 42 a; 8 Co. 96 a.

So, if a testator gives his executors full power to receive the mesne profits of his estates in a particular place upon trust to pay his debts, and afterwards devises those estates to a person for life, the freehold will become

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vested in such devisee on the death of the devisor, and he may make a good tenant to the *præcipe*.

Carter v. Barnardiston, 1 P. Wms. 505; 2 Br. P. C. 1.

As it is necessary, that the person who suffers a common recovery should have not only an estate of freehold in the lands, but also an estate in possession, it followed that either where the lands are let out on leases for lives, or where there was an estate for life prior to the estate of inheritance, that the persons entitled to the inheritance were disabled from suffering recoveries of them. To remove the disability in the first instance, it was usual for the person who intended to suffer the recovery to get a conditional surrender from the lessee for life, in order to become seised of a freehold in possession, and be thereby enabled to make a good tenant to the *præcipe*. But this being productive of several obvious inconveniencies, it is enacted by stat. 14 G. 2, c. 20, with a retrospect and conformity to the ancient law,<sup>(a)</sup> that a good tenant to the *præcipe* may be made, without the surrender of such leases, or the concurrence of the lessees. But estates for life, which are prior to the estate of which the recovery is intended to be suffered, must still be surrendered to the person against whom the writ of entry is brought, this case being expressly excepted in the second section of the statute.

(a) Pig. 41; 1 Burr. 115.

The prior estate for life ought to be surrendered to the person who has the remainder or reversion before he makes a tenant to the *præcipe*; but, if the surrender is made after the execution of the deed, by which the lands are conveyed to the person who is to be tenant to the *præcipe*, it must then be made to him, otherwise it will be void; because the person who is to suffer the recovery has then no reversion in him for the surrender to operate upon.

Pigot, 50.

Common recoveries having been long considered as common assurances of lands, and in the nature of conveyances by consent, the judges have, in consequence of particular circumstances, sometimes presumed that the tenant for life had surrendered his estate, although a surrender was not actually proved. As, where the possession has accompanied a recovery for a long time.<sup>(a)</sup> So, where collateral evidence has been given of a surrender by the tenant for life.<sup>(b)</sup> || But such a presumption will not be made where the possession has not gone with the recovery;<sup>(c)</sup> or where any act has been done by the tenant for life, as owner, subsequent to the recovery; as,<sup>(d)</sup> where the person, by whom the recovery was suffered, had accepted a lease derived under the title of the jointress; so that there was an acknowledgment on his part that the estate for life was continuing.

Cruise on Recov. 36. (a) Green v. Froud, 3 Keb. 310; 1 Mod. 117; 1 Ventr. 257. (b) Warren v. Grenville, 2 Str. 1129. (c) Goodtitle v. Duke of Chandois, 2 Burr. 1065. (d) Haines Barley's case, 5 Mod. 210.||

[Where indeed, after a recovery, the deeds were suppressed by the tenant for life, so that it could not be made out whether he had surrendered his estate for life to the tenant to the *præcipe* or not, it was decreed in Chancery for the recovery, without allowing a trial at law; for where deeds are suppressed, *omnia præsumantur*.

Gartside v. Ratcliffe, 1 Ch. Ca. 292.

In a writ of error to reverse a common recovery, the tenant to the *præcipe* was made by a fine, the recovery was suffered, and the fine was

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reversed; yet it was holden a good recovery, for there was a good tenant to the *præcipe* at the time.

2 Salk. 568, Lloyd v. Evelin. [But, if the fine be in itself void, as, if the person who levied it had no estate of freehold in the land; then the recovery will be void, because in that case the fine passeth no estate. Dormer v. Parkhurst, 3 Atk. 135; 4 Br. P. C. 405.]

[It hath been said by Sir M. Hale, that the cognisee of a fine *oct. purificat.* would be a good tenant to the *præcipe* in a recovery suffered the same day, and the court would presume a priority to support a conveyance.

Phetylplace v. —, 3 Keb. 597.]

|| A fine levied by tenant in tail in a *prior* term, without any declaration of the use, will, by construction, be deemed a fine levied to the conusee for his own use, so as to keep the freehold in him, to make him tenant; and this, though a long interval has elapsed, and there was at the time of levying the fine no declared intention of suffering a common recovery. The subsequent transaction rebuts the presumption of a resulting use in favour of the conusor.

1 Prest. Convey. 36; Ld. Altham v. Ld. Anglesey, Gilb. Eq. Rep. 16; 2 Salk. 676, S. C.; 11 Mod. 210, S. C.; Thrustout v. Peake, 2 L. Str. 17.]

If a fine be levied to a lessee for years of the same land for the purpose of making him tenant to the *præcipe* in a common recovery, the term for years will not be merged by the fine: for in the third section of the statute of Uses, 27 Hen. 8, there is a saving to all persons and their heirs, who shall be seised to any use, of all such former right, title, &c., as they had to their own use, in any manors, lands, &c., whereof they shall be seised to any other use.

1 Vent. 195; 1 Mod. 107; Cro. Ja. 643; 2 Ro. Rep. 245.

A husband seised *jure uxoris* may make a tenant to the *præcipe* by fine without his wife's joining him in it.

Cruise on Recov. 58, &c.

It hath been heretofore thought that a good tenant to the *præcipe* might be made by a feoffment with livery of seisin: but this doctrine hath lately been denied.(a)

Taylor v. Horde, 1 Burr. 60; 5 Br. P. C. 247; Cowp. 689. (a) || But notwithstanding the denial of this doctrine in the case of Taylor v. Horde, the better opinion is, that the feoffment of a tenant for years will gain the freehold. 3 Atk. 140, 339; Mr. Butler's note to Co. Lit. 330 b; Preston's Convey. vol. i. 59, 60.]

A good tenant to the *præcipe* may be made by bargain and sale enrolled; and the bargainee may appear and vouch before entry, or before the bargain and sale enrolled, provided it be enrolled within six months, as prescribed by the statute; for although the freehold does not pass from the bargainor until the enrolment, yet as soon as that is done, the freehold is considered as having passed from the bargainor at the time when the bargain and sale was executed, by relation.

Hynde's case, 4 Co. 71; Ca. temp. Talb. 167.

As common recoveries are much favoured by the courts of law, a bargain and sale to make a tenant to the *præcipe*, will not be deemed void on account of any trifling mistake or inaccuracy.

Lloyd v. Ld. Say and Sele, 1 Salk. 341; 10 Mod. 40; 1 Br. P. C. 379.

A tenant to the *præcipe* may also be made by lease and release, and

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the reservation of a pepper corn is a sufficient consideration to raise a *use* to support a common recovery.

*Barker v. Keate*, 1 Mod. 262; 2 Mod. 249.

In some cases a common recovery may operate by estoppel, although there be no tenant to the *præcipe*; but this is only where the person who suffers the common recovery is tenant in fee; for the issue in tail cannot be bound by estoppel, as they do not claim from their immediate ancestors, but from the first purchasers, *secundum formam doni*.

10 Mod. 45; God. 147.

|| Hence a recovery suffered by a tenant in fee, without a good tenant to the *præcipe*, will have the effect of revoking a will; for the tenant in fee is estopped by what appears on the record, and, if living, cannot say that there was no good tenant to the *præcipe*, and every person claiming under him must be estopped also.

*Doe v. Bishop of Landaff*, 2 N. R. 504; *Bennett v. Vade*, 9 Mod. 312.

By st. 14 G. 2, c. 20, § 4, reciting that “by the default or neglect of persons employed in suffering common recoveries, it had happened, and may happen, that such recoveries are not entered on record, whereby purchasers for a valuable consideration may be defeated of their just rights;” it is enacted, “that where any person or persons hath or have purchased, or shall purchase for a valuable consideration any estate or estates in lands, tenements, or hereditaments, whereof a recovery or recoveries is, are, or were necessary to be suffered, in order to complete the title, such person or persons, and all claiming under him, her, or them, having been in possession of the purchased estate or estates from the time of such purchase, shall and may, after the end of twenty years from the time of such purchase, produce in evidence the deed or deeds, making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or common recoveries, and declaring the uses of a recovery or recoveries, and the deed or deeds so produced (the execution thereof being duly proved) shall in all courts of law and equity be deemed and taken as a good and sufficient evidence for such purchaser and purchasers and those claiming under him, her, or them, that such recovery or recoveries was or were duly suffered and perfected according to the purport of such deed or deeds, in case no record can be found of such recovery or recoveries, or the same should appear not to be regularly entered on record: Provided always, that the person or persons making such deed or deeds as aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or recoveries.”

By § 5, reciting that “it had frequently happened, that the deeds for making the tenants to the writs of entry or other writs for suffering common recoveries had been lost, or that the fines or deeds making the tenants to the said writs had not been levied or executed till after the judgment given in such recoveries, and the writ of seisin awarded, by reason whereof great doubts had arisen, whether such recoveries, for want of proper tenants to the writs, are good and effectual in law. To prevent such doubts for the future, and in order to render common recoveries more certain and effectual, it is enacted, that every common recovery already suffered, or hereafter to be suffered, shall, after the expiration of twenty years from the time of the suffering thereof, be deemed good and valid to all intents and purposes, if

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it appears on the face of such recovery, that there was a tenant to the writ, and if the persons joining in such recovery had a sufficient estate and power to suffer the same, notwithstanding the deed or deeds for making the tenant to such writ, should be lost or not appear."

By § 6, it is enacted, that "from and after the commencement of this act, every recovery already suffered, or hereafter to be suffered, shall be deemed good and valid to all intents and purposes, notwithstanding the fine, or deed or deeds, making the tenant to such writ, should be levied or executed after the time of the judgment given in such recovery, and the award of the writ of seisin as aforesaid, provided the same appear to be levied or executed before the end of the term, Great Session, Session or Assizes, to which such recovery was suffered, and the persons joining in such recovery had a sufficient estate and power to suffer the same as aforesaid."||

[Where it appeared from the return of the writ of seisin, that seisin had been delivered prior to the date of the conveyance for making the tenant to the *præcipe*, yet as all the proceedings were in the same term, the recovery was holden to be good under the above statute of 14 Geo. 2, c. 20, § 7, that act being a remedial act, and therefore to be extended to all cases of similar inconveniency.

Godright v. Rigby, 2 H. Bl. Rep. 46; 5 T. R. 176, S. C. affirmed in error; 2 Dow's P. C. 250 affirmed in Dom. Proc.]

If a manor be given to a man and woman, and the heirs of the body of the man begotten on the woman, and they intermarry, and then the husband suffer a recovery of the whole manor, this is good for a moiety; because the gift being made before marriage, they had each an undivided moiety, which they might transfer. But the recovery can operate but for a moiety, because the husband only was tenant to the *præcipe*, and, consequently, the demurrant could recover only his interest in the manor, which was but a moiety.

Moor, 95, Brabroke's case. If a husband tenant in tail suffers a *præcipe* to be brought against him and his wife, where she has nothing in the land; this is a good recovery to bar the entail: for though the feme was made tenant to the *præcipe*, yet she shall have no share of the recompense in value, because she really lost nothing; but the whole recompense recovered against the vouchee shall go to the husband and his heirs, as the estate-tail should have done, because he only was seised of the land, and could lose it. Yet the feme shall lose her jointure or dower by joining in the recovery, because she is estopped to claim any thing in the land against her solemn act of record. Plowd. 514; Vent. 358; Hob. 27; 2 Co. 74; Plowd. 515.

If lands are given to a man and his wife, and the heirs of the body of the husband, and a recovery is had against him only, this recovery will neither bar the reversion nor the tail: for the recompense being to go in succession, as the estate which the tenant lost would have done, the husband could not lose all the land, because he was not a legal tenant to the whole, his wife being jointenant with him, who was no party to the writ; nor could the recovery be good for a moiety, because there are no moieties between baron and feme, but both are considered as one person in law. But, if the husband had levied a fine, and the conusee suffered a recovery, and vouched the husband, who vouched the common vouchee; this had been a good bar of the entail; for here the husband came in to defend the estate-tail, which the wife was a stranger to, and the assets which he recovered over is a recompense for the estate-tail, which he only had a right to without the feme, and which the law gives him power to dispose of.

Moore, 210; Owen and Morgan, 3 Co. 5; 2 Ro. Abr. 395; 4 Leon. 93; And. 162. Clithero v. Franklin, 2 Salk. 568.

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[A being seised of a manor to him and his wife, and to the heirs male of the body of the husband ; A bargained and sold the manor to a stranger, who suffered a common recovery, in which A was vouched, who vouched over the common vouchee. It was adjudged, that although A alone was vouched, and not his wife, yet that the estate-tail was barred ; for the husband coming in as vouchee, the recovery barred all estates which were ever in him.

Fitzwilliam's case, 6 Co. 32.]

So, in ejectment upon special verdict, the case was—A seised in fee of the lands in question hath issue B his eldest son, C his second, and D his third son ; upon a marriage intended between D his youngest son and one E, he, before marriage, covenants to stand seised to the use of himself for life, remainder to D and E and the heirs male of their two bodies, remainder to D and the heirs male of his body, remainder to C and the heirs male of his body, remainder to B and the heirs male of his body, the remainder to his own right heirs ; A dies, a *præcipe* is brought against one Upton as tenant of the freehold, and after, before the return of the writ, D by bargain and sale conveys the land to Upton and his heirs, and the deed was enrolled after the return of the writ, and within the six months ; Upton vouches D only without his wife, and a common recovery was suffered to the use of D and his heirs ; then E dies, and after D dies without issue male, having issue four daughters ; and between them and C in remainder was the question, what was barred by this recovery. 1st, It was agreed on both sides, that here was a good tenant to the *præcipe*, the bargain and sale being made to Upton (*a*) before the return of the writ ; and though the deed was not enrolled before the return, yet it being enrolled in due time, the freehold was in Upton *ab initio*. 2dly, That this settlement being made before marriage, when the husband and wife took by moieties and not by entierties, the husband had absolute power over his own moiety, and therefore for that the recovery was an absolute bar ; wherein this differs from the case of Owen and Morgan, 3 Co. 5, where they took by entierties. 3dly, That this recovery was no bar to the other moiety of E, because she was not party, but her estate-tail in that continued untouched, though it was urged also to be a bar for her moiety, she dying first, and so her husband in as sole tenant of the whole *ab initio*, and that during the coverture the husband had power to make a good tenant of the whole ; but the court held otherwise. 4thly, It was holden, that the estate-tail to D and E being determined, the remainder to D in tail male general, and all the other remainders depending thereon were barred absolutely by this recovery ; for D coming in as vouchee, comes in, in privity and representation of all the estates he hath or had, and, consequently, he comes in representation of the remainder to himself in tail male general, and then the recompense in value goes to that, and also to all the other remainders depending thereupon, and by consequence, all are barred by the recovery.

Hallet v. Saunders ; 2 Lev. 107, S. C. (*a*) That if the tenant to the *præcipe* gains a freehold before judgment, it is sufficient ; for it is not enough in a counterplea of a voucher to say, the voucher had nothing in the lands at the time of the voucher, without adding, *nec unquam postea*, and so it is of nontenure. Lacy v. Williams, 2 Salk. 568 ; Carth. 472, S. C. ; Comb. 425, S. C. ; Ld. Raym. 227, 475 ; Show. 347.

[Where tenant in tail, before marriage, conveyed his estate to the use of himself and his intended wife for their lives, with remainder to the heirs of their bodies, remainder to himself and his intended wife in fee, and afterwards suffer a recovery, in which he only was vouched ; Lord Camden



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held, that the recovery was a severance of the jointure, and passed a moiety.

Moody v. Moody, Ambl. 649.]

Tenant in tail, in consideration of his son's marriage, covenanted to stand seised to the use of himself and his heirs till the marriage, and then to the use of himself for life, and after to the use of his son and his wife, and the heirs of their bodies, and suffered a common recovery with single voucher to this purpose, and then died without issue. This recovery did not bar the remainder expectant on the estate-tail, for the covenant had changed the estate-tail into a fee, and consequently, the recompense could not be in lieu of the entail, since the tenant to the *præcipe* was not seised of the estate-tail at the time of the recovery suffered.

Yelv. 51, Freshwater v. Rois. See 2 Salk. 619, which seems contrary.

A, tenant for life, remainder to B in tail, the remainder to C in fee, A and B join in a fine *sur done*, grant and render, to a stranger, who renders it to A for life, remainder to B and his heirs; afterwards A and B suffer a recovery with single voucher to the use of B and his heirs. This recovery did not bar the remainder in fee; because by the render they were seised of a new estate, and B was not either tenant in possession, or seised in right of the entail; and, consequently, the recompense being given in lieu of the estate recovered, the tail could not be docked, nor the remainderman barred by this recovery, because the tenants to the *præcipe* were not seised of it at the time of the recovery suffered.

Peck v. Channel, Cro. Eliz. 827; Moore, 634, S. C.; Owen, 129, S. C.

[A, tenant for life, remainder to trustees to preserve contingent remainders, remainder to the first and every other son in tail-male, remainder to the daughters in tail general, remainder to the heirs of his body, with remainders over. A suffers a recovery with single voucher, being himself tenant to the voucher. Adjudged by the House of Lords, that this recovery with single voucher did not bar the remainder over.

Meredith v. Leslie, 6 Br. P. C. 209.]

As to the use of the single and double voucher, it is to be observed, that the tenant who loses the land has, upon his vouching over, a recompense in value adjudged against his vouchee, which is to go in the same succession as the land recovered would have done: now a recovery with single voucher is sufficient to bar an estate-tail where the *tenant in tail* is tenant to the *præcipe*, and *seised* of the lands in tail at the time of the *præcipe* brought against him; for the recompense in value must follow the descent of the land which the tenant loses, and when that proves to be the estate-tail, then the issue is supposed to have an equivalent for it, and, consequently, not to be prejudiced by the recovery. But because a single voucher can bar *only the estate which the tenant is seised of at the time of the præcipe* brought, and not *any right* which he hath, it was found necessary to admit the use of a double voucher; for should tenant in tail discontinue the tail, and take back an estate or disseise the discontinnee, a recovery against him with a voucher over could not bar the estate-tail; for the recompense comes in lieu of the land recovered, which was the defeasible estate, and consequently, the issue has nothing in value for the estate-tail, without which he cannot be barred.

Bro. tit. *Recovery*; Yelv. 51; 3 Co. 5; Moore, 256.

But, in this case the tenant in tail, after the disseisin, had either by fine,

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or lease and release, made a tenant to the *præcipe*, and come in himself as vouchee, and then vouched over the common vouchee; this double voucher had been sufficient to bar the tenant in tail and his heirs of every estate which he was at any time seised of. For when the tenant in tail comes in as vouchee, it is presumed he will, and he has an opportunity to, set up every title he had to defeat the demandant; and since what he offered was not sufficient to bar the demandant, the court takes it for granted, he had no other title than what he set up, and therefore will give him but one recompense for all.

3 Co. 6 b; Plowd. 8; Manxel's case, Cro. Eliz. 562; Poph. 100; Moore, 365; Hob. 263; Doe v. Halley, 8 T. R. 6.

Thus, if A be tenant for life, the remainder to B in tail, and a stranger disseise A and enfeof B; if a *præcipe* be brought against B and a recovery suffered as usual; this shall not affect the estate-tail, because B had only a *right* to that, and was not seised of it; and the recompense was not given in lieu of the tail, because the estate-tail was not in question on the recovery, for B could not lose the estate he had not. But, if in this case B had made another tenant to the *præcipe*, and come in himself as vouchee, this would have barred the entail.

3 Co. 58 b; 2 Ro. Abr. 395.

If A be tenant for life, remainder to B in tail, and B disseise A and suffer a common recovery, himself being tenant to the *præcipe*; this recovery with a single voucher is sufficient to bar the estate-tail in B, because he was actually seised of that at the time of the *præcipe* brought against him; for his disseisin did not divest his own estate, but only gave him a defeasible estate for life, which was immediately merged in his remainder; because the estate for life and his inheritance could not subsist together at the same time in him.

2 Ro. Abr. 395.

Thus we see how estates-tail are barred by recoveries, and the use of the single and double voucher. And in this respect the operation of a recovery is correspondent to that of a fine; for they are but different ways of transferring estates-tail for the security of purchasers. But the operation of a *fine* differs from a recovery in respect to *strangers* who have *reversions* or *remainders expectant on estates-tail*; for a *fine* does *not* bar them, unless they omit to make their claim within *five* years after their reversion or remainder is *to execute*; but a recovery reaches them immediately, and at the same time bars the estate tail and all reversions and remainders on account of this supposed and imaginary recompense.

Co. Lit. 372 a; 2 Ro. Abr. 396; Moore, 156; Bro. tit. *Recovery*, (28, 55.) || Although it is now settled, that where tenant in tail has also the immediate remainder or reversion in fee by descent, a fine will *primâ facie* enable him to acquire the fee simple in possession, and that a purchaser cannot object to the title for want of a recovery; unless he can show that the reversion in fee has been aliened or encumbered, Sperling v. Trevor, 7 Ves. 497; still a recovery would in this case seem to be advisable; for by means of the recovery the title will depend wholly on the estate-tail, and the remainder or reversion in fee will be immaterial, while the fine will bar the estate-tail, and convert it into a base or determinable fee; which will merge in the remainder or reversion in fee; and all the charges and encumbrances (as judgments, annuities, &c.) affecting the reversion or remainder in fee, will be accelerated and become an immediate, instead of a remote charge, on the possession. So also tenant in tail having the remainder or reversion in fee by descent, will become immediately chargeable with the debts of the ancestor, who was the owner of the remainder or reversion in fee simple. Thus these encumbrances, instead of being barred, as they may be by a recovery, will become an available charge. 1 Prest. Convey. 9, 10.||

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And as a common recovery suffered by tenant in tail bars all reversions and remainders expectant, so it avoids all charges, leases, and encumbrances made by those in reversion or remainder, and the recoveror shall enjoy the land free from any such charge for ever. As, where he in remainder upon an estate-tail granted a rent-charge, and the tenant in tail suffered a recovery; it was adjudged, that the grantee could not distrain the recoveror; for since the rent was only at first good, because of the possibility of the grantor's remainder coming in possession; when that possibility ceases by the recovery of tenant in tail, such grant must then become void.

Moore, 158, Cro. Eliz. 718; Co. 62; Capell's case, 2 Ro. Abr. 396; Moore, 154; 4 Leon. 150, &c.; Poph. 5, 6.

If there be tenant in tail, remainder for years, remainder in fee, and the tenant in tail suffers a recovery; this bars the remainder for years as well as the remainder in fee.

Mod. 110, 2 Lev. 30. But, where a man devised lands to J S his son for life, the remainder to the first son of J S and the heirs male of the body of such first son, and so to the other sons, remainder to A and B for their lives, to secure the several remainders before limited, J S suffered a recovery, yet the contingent remainders were not barred, nor the remainders to A and B, because the limitation to A and B being designed by the will to preserve the contingent estates limited to the first and other sons of J S, the Chancery transposed the estates to preserve the intention of the will; and therefore the remainders to A and B were decreed to precede the contingent estate, and by that means preserve them from the recovery. 2 Ch. Ca. 10, Green v. Hayman.

If a gift in tail be made reserving rent, and the donee suffer a recovery, this is no bar of the rent, but it remains a collateral charge on the land distrainable of common right; for since the tenant in tail took the land subject to that charge by the original donation, the recoveror who claims under him can only have the estate, as he who suffered the recovery had it; therefore if there be a limitation of a use upon condition, and the *cestui que use* suffer a recovery; this does not destroy the condition; for the estate of him who suffered the recovery being charged with it, he could not make his purchaser a better title than he himself had.

White v. West, Cro. Eliz. 727, 768, 792; 2 Anders. 170, S. C.; Moore, 575, S. C.; Pigot, 139.

For the same reason, if tenant in tail grant a rent charge, and then suffer a common recovery, yet the land is still chargeable with the rent in the hands of the recoveror; for though the statute *de donis* render such charges void as to the issue, where the estate-tail descends according to the form of the gift; yet that statute makes no such provision for any person who claims the land by another title than the gift in tail; and therefore the recoveror, who is not comprised in the first donation, must take it subject to the charges which lay on it when he purchased it.

Benson v. Hodson, 1 Mod. 108; 2 Lev. 28, S. C. So, Beek v. Welsh, 1 Wils. 276.

|| So, where tenant in tail mortgage for years, and afterwards, in consideration of marriage, suffers a recovery for the purpose of settling a jointure on his wife; it will enure to make good the mortgage. So, where he confesses a judgment, &c., and suffers a recovery to any collateral purpose, it makes good all such encumbrances.

Goddard v. Compkin, 1 Ch. Ca. 119.

So, where tenant in tail by lease and release previous to his marriage, conveyed his estate to trustees to himself for life, remainder to his intended wife for life, remainder to the first and other sons of the marriage in tail male; the marriage took effect, and there was issue a son; nineteen years

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after the husband suffered a recovery, and declared it to be to the use of A B and his heirs in trust to sell the premises for the payment of his debts; A B sold the lands for the payment of the debts according to the trust reposed in him; the tenant in tail died, and his son claimed the lands; the court were of opinion, that the recovery enured to the uses of the settlement, and the purchaser had no title.

Goodright v. Mead, 3 Burr. 1703.

So, where a father by settlement on his marriage conveyed an estate to the use of himself for life, remainder to the first and other sons of the marriage in tail; and afterwards the son on his marriage conveyed part of the estate by lease and release to the use of himself for life, remainder to his intended wife for life, remainder to the heirs of the body of the wife, remainder to his own right heirs; and some years after the father and son mortgaged the estate for a term of years, and declared the uses to the mortgagee, and then to the father for life, remainder to the son in fee; Lord Northington was clearly of opinion, that the recovery enured to the uses of the settlement on the marriage of the son.

Cheney v. Hall, Ambl. 526; 2 Eden, 357, S. C.||

But, if there be tenant for life, the remainder to J S in tail, and J S make a lease for years, to commence after the death of tenant for life, and the tenant for life suffer a common recovery and vouch J S, this recovery does not destroy the lease for years, but the lessee may falsify such recovery.

Cro. Eliz. 718; Pledgard v. Lake, Poph. 5.

[A devised a rent of 50*l.* *per annum*, to be issuing out of lands, to his son and his heirs; and if his son should die without heirs-male of his body, then he devised it over; the son suffered a recovery of this rent, and died without issue male. Lord Chief Justice Bridgman and all the other judges were of opinion, that the recovery was good, and the remainder well barred; and this judgment was affirmed in the Court of King's Bench.

Smith v. Farnaby, Carter, 52; Sid. 285; Weeks v. Peach, Lutw. 1224.

A distinction has, however, been adopted between a grant of a rent-charge in tail, with a remainder over of the same rent-charge in fee, and a grant of a rent-charge in tail, without any subsequent limitation of it in fee. In the first case, the tenant in tail acquires an estate in fee-simple in the rent-charge by means of the common recovery; but in the second he only acquires a base fee, determinable on his decease and failure of the issue.

Chaplin v. Chaplin, 3 P. Wms. 229. For the principles on which this distinction is founded, see Mr. Butler's note, Co. Lit. 298, a, n. 2.]

If baron and feme be tenants in special tail, the remainder to A in tail, the remainder to B in fee, and the husband levy a fine to C in fee, and then die leaving issue, the conusee takes by the fine a qualified fee, and shall enjoy the land against the issue. But yet upon the death of the husband, the wife is again seised of the estate-tail, because she being no party to the fine, could not be barred by it, and the remainders are again revested: and if the wife suffer a common recovery, either with single or double voucher, this shall bar the remainders in A and B, because she was seised of the tail at the time of the recovery, and, consequently, the recompense shall go to them when the tail is spent. But this recovery does not reach the interest which C took by the fine, because the husband had power to bar the entail by the fine, and the recovery of the wife cannot transfer that which is already given by the fine; and therefore if the

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wife dies leaving issue, the conusee shall have the land while any issue inheritable to the entail is in being; and when the issue is spent, the recoveror shall have the land as they in the remainder should have had, if the recovery had not been suffered.

Hob. 259; 2 Lev. 29.

If tenant in tail be attainted of treason, and after suffer a common recovery, this shall not destroy the remainder; for a man attainted is not capable of taking any thing, but for the benefit of the king; and, consequently, the recompense in value must go to the king; and he in remainder can have no benefit by it, and without that the remainder-man cannot be barred. Besides, recoveries being common conveyances, this recovery of the person attainted seems to be void, as any other conveyance of his would be, and therefore the remainder cannot be barred.

2 Ro. Abr. 394; Jenk. Cent. 250. In 1 Keb. 398, Barton and Berner's case, 37 & 38 Eliz. B. R., is cited as *contra*. If tenant in tail be attainted, and the king grant his land to J S, who bargains and sells it to B, and a *præcipe* be brought against B who vouches J S, and he vouch over the common vouchee: this is no bar of the remainder; because J S was never seised of the estate-tail, but was always a stranger to the first gift; for the king's grant gave him a qualified fee, which was the estate he came in to defend, when he was vouched; and the remainder can never be barred when the tenant in tail is not concerned in the recovery. 2 Ro. Abr. 394.

|| But between the crime and attainder, it would seem from analogy, that a common recovery may be suffered.

Stevens v. Winning, 2 Wils. 219.||

If a husband, seised of land in right of his wife for life, the remainder to A in tail, the remainder to B in fee, bargain and sell the land to J S against whom a *præcipe* is brought, who vouches A in remainder in tail, and he vouches over the common vouchee; this is good to bar the remainder, though not the wife; for here was a legal tenant to the *præcipe*, and he in remainder was called in to defend his estate-tail, and has recompense in value for the loss of it, which is to go in succession to B when the estate tail fails.

2 Ro. Abr. 394.

When common recoveries were allowed to be common conveyances, the judges would no more allow a recovery than any other conveyance to divest the king of his interest in the land, but preserved his reversion or remainder, though they suffered the recovery to bar the estate tail on which it depended; for it were unreasonable to strip the king of any part of his revenue upon the consideration of an imaginary recompense. But yet the estate tail is barred, because otherwise, where the reversion or remainder was in the crown, the estate in the subject must be perpetuated, which is against the policy of the law.

2 Ro. Abr. 393, 396; Co. Lit. 372; Moore, 195; Bro. tit. *Recovery*, 31, tit. *Tail*, 41. || The origin of this protection to the crown cannot be accounted for on any other ground than a principle of tenure, that the estate of the crown is part of its ancient dominion; and that as against the crown, the tenant in tail is in the same predicament, as if his estate was derived out of a base or determinable fee, or an estate subject to a condition. 1 Prest. Convey. 19.||

But in the reign of H. 8, there was a statute made to invalidate recoveries, even against the issue in tail, where the reversion or remainder was in the crown. The intention of the act was, to perpetuate those estates in families which the king himself had given, or for money or other consideration, had procured to be given, to any subject as a *præmium* for his

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services to the crown; that the descendants of that stock might never forsake the interest of the crown that had so liberally rewarded their ancestor's loyalty; that where a generous emulation of their actions proved too weak a tie to engage them openly in the same interest, they might at least be prevailed on out of gratitude and prudence, not to attempt any thing to the prejudice of the crown, from whom they must acknowledge they derived their present support and splendour. But this statute does not preserve all estates tail where the reversion or remainder is in the crown; but those only which were *given (a) by* the king himself, or *(b) procured* to be given for money or other consideration.

34 & 35 H. 8, c. 20. (a) [They must be of the gift of the king, by way of reward for services. *Perkins v. Sewell*, 4 Burr. 2223; 1 Bl. Rep. 654.] (b) As, if the king procures A to make a gift in tail to B by deed indented and enrolled, the remainder to the king in fee in tail; this entail in B cannot be docted by a common recovery, because protected by the express words of the statute. Co. Lit. 372 b. But, if a reversioner or remainder-man upon an estate-tail grant his reversion or remainder to the king, this is no security to the issue in tail, because the estate-tail was neither of the gift nor other provision of the king, and, consequently, not within the act. 2 Co. 15; *Wiseman's case*, Mo. 195; *Yelv.* 149, S. C. So, if the reversion on an estate-tail descend to the king from any collateral ancestor; this does not bring the estate-tail within the protection of the act, for the *entail must be created by the king*, and not by a subject, though the king be his heir; for the act specifies only gifts made to *subjects*, and none can have subjects but the king. Nor is it sufficient within the act, that the king creates the estate-tail himself, but the *reversion must continue in the crown*; for whenever he grants that over, the estate-tail, though originally of the gift of the king, is out of the protection of the act, and subject to a common recovery, because the statute only preserves them where the reversion is in the king. Co. Lit. 372. Donee in tail of the gift of the king, the reversion being in the crown, makes a gift in tail; the second donee suffers a common recovery. It was resolved by eleven judges, 13 Car. 1, that his issue was not within the privilege of 34 H. 8, c. 20, for his estate, as far as it could, disaffirmed the reversion of the king, though it could not take it out of him, and his possession was injurious to the estate given by the king, and therefore no colour to allow it the protection of that act. Sir T. Jon. 250, 251, *Earl of Ormond's case*.

Henry 8 gave lands to Michael Stanhope and his wife, and the heirs of their bodies, in consideration of their services: Michael died, and his son and heir petitioned the queen to grant the reversion to some persons in fee, to the intent that he might make a lease for ninety-nine years by way of mortgage, and entered into a recognisance to the queen, conditioned that nothing should be done while the reversion was out of the crown, prejudicial to the queen, and accordingly the queen conveyed the reversion to the Lord Burleigh and Sir Walter Mildmay in fee; then the son made a lease for ninety-nine years, and suffered a recovery, and then the trustees reconveyed to the queen. And it was resolved, 1st, That the grant of the queen was good: 2dly, That during the time the reversion was out of the crown, the son was not restrained from alienating within 34 H. 8, c. 20, and so the recovery good to bind the issue. (c) But a fine or recovery after the re-grant of the queen would not have been good to bind the issue, as it seems, because that act doth not require that the reversion should always continue in the king; but it sufficeth if it be in him at the time of the fine levied, or recovery suffered.

Raym. 288, 358; Sir T. Jon. 251; *Gardiner v. Bambridge*, cited in Sir T. Raym. 288, 358, and Sir T. Jon. 251; *Hardr.* 409, S. C. ¶ This mode of evading the statute is now prevented by 1 Ann. st. 1, c. 5, § 7, which restrains the crown from alienating its possessions for a greater estate than three lives or twenty-one years. (c) By Jones in his argument.¶

Richard 3, by letters patent, gave several lands to the Earl of Derby, and

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the heirs male of his body, in consideration of great services to the crown, &c. Afterwards, by a private act made 4 Ja. 1, several alterations were made in this estate; as that Charles, then Earl of Derby, should hold and enjoy them for his life, and after his death they should go to James his son and heir apparent, and the heirs male of his body, and so to the second, third, &c., and seventh son of Earl Charles, and then to several others in tail male, who by the limitation of the letters patent would have succeeded to the estate upon the failure of issue male of Earl Charles, with power for Earl Charles and the sons successively, to make leases for lives or years, and jointures for wives. After Earl Charles's death, his son Earl James levied a fine of these lands, and sold them to a stranger. Upon a special verdict in ejectment brought after his death by his son, it was resolved by all the judges of England, in the Exchequer-chamber, except three, that the fine was no bar, for that the reversion continued in the crown, and that these estates given by 4 Ja. 1 were no new estates, but all within the compass of the first estate-tail created by the letters patent, and only a distribution of the enjoyment of them, and all to the same persons who would have been entitled under the letters patent; and the power to make a lease was, with conformity to the power of tenant in tail; and that to make jointures was but in lieu of dower. Besides, there was a saving to the king, and all other persons, of all such rights, &c., so as the prerogative of the king, by his reversion, to restrain the tenant in tail from barring his issue, was saved, and the eighth and ninth, and all other sons inheritable by virtue of the entail let in, through the first, &c., and seventh only were named, and the alterations were only in accidents, not in the substantial parts of the limitations, and so within 34 H. 8, c. 20.

Sir T. Raym. 260, 286, 350, 351, &c.; Sir T. Jon. 249, 250, &c., Earl of Derby's case, or *Murray v. Eyton*; 1 Wils. 275.

[William, Earl of Derby, conveyed lands to trustees, to the intent that they should convey the same to Queen Elizabeth, her heirs and successors, that the earl might accept of a grant from the crown of the same lands to him and the heirs male of his body, leaving the ultimate reversion in the crown, which was accordingly done. It was determined, that this estate-tail was not within the protection of the above statute, it being a fraudulent contrivance to create a perpetuity.

*Johnson v. Earl of Derby*, Pigot, 201; 11 Mod. 304; 2 Show. 104. The only mode of acquiring a good title to an estate-tail, whereof the reversion is fairly in the crown, is by an act of parliament, enacting that the reversion shall be devested out of the crown, and vested either in the tenant in tail, or in some other private person, by which means it becomes barrable by a recovery. *Cruise on Recov.* § 277. Vide *Strickland's Act*, 30 G. 3, § 51.]

When men observed the effect of recoveries, and that they were construed by the judges not only to transfer estates-tail, but even reversions and remainders dependent on them, except those vested in the crown, they began to grow as uneasy under this liberty as they formerly were under the restriction of the statute *de donis*; for they thought it very severe that they could not carve what estate they pleased out of their own inheritance, without any other security for the reversion they reserved to themselves than the generosity or promise of the donee. Hence we find men themselves endeavouring to create perpetuities, by annexing conditions of their own invention, and restraining their donees from alienating, under the penalties of losing their estates. But the judges had so long struggled with perpetuities, and found them so much against the interest of the long robe,

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and of the whole nation in general, as a great discouragement to industry, that they constantly condemned all those settlements which came before them, and not only resolved that a common recovery is inseparably incident to an estate-tail, but that it is an undeniable argument against any settlement, if it be found to tend to a perpetuity, and in such case a recovery has been allowed to bar it.

Co. 84; Corbett's case, 6 Co. 42; Co. Lit. 224; Mo. 73.

But in case of an executory devise, which is to vest upon a contingency to happen within a life in being, there a common recovery will not bar such future interest; as, if lands be devised to A and his heirs, and if he die without issue, living B, then to B and his heirs, in this case, if A suffer a common recovery, and die without issue in the life of B, this recovery shall not bar the future interest of B, for B by the devise had only a possibility, and no present interest, and the recompense in value cannot go to those who were neither parties to the recovery, nor had any interest in the land at the time of the recovery suffered. Nor is there any danger of a perpetuity in this case, because here the future interest of B must vest on a contingency which is to happen within the compass of a life in being.\*

Pells v. Brown, Cro. Ja. 591; Palm. 131, S. C.; 2 Ro. Abr. 394, S. C.; Lev. 12. \*It was said in this case, if the person to whom the executory devise is limited come in as vouchee, in a common recovery, that his possibility is thereby given up, and his heir barred. Vide Fearn's Essay on Contingent Remainders, third edition, 307.

If lands be given to J S and his heirs, as long as B has issue of his body, J S by recovery shall not bind him that made the gift, but that upon the death of B, without issue of his body, the lands shall revert to the donor; for that the donor had no interest in the land, for there can be no fee upon a fee; and a common recovery against tenant in fee-simple shall never bind any collateral title or possibility, because the recompense cannot go to those who had no interest in the land.

Cro. Ja. 593.

So, if the mortgagee in fee suffers a recovery, this shall not bind the mortgagor's right of entry upon performance of the condition. But in these cases, if the donor or mortgagor had been parties to the recovery, by way of voucher, then their right had been bound, not only on account of the recompense, but because they are estopped by the recovery to claim the land against the recoveror or his heirs, when they were called in before the judgment to defeat his title, but could not do it.

Palm. 135; Cro. Ja. 593.

[Where one devised lands to A and the heirs male of her body, upon condition and provided she intermarried with, and had issue male by a person surnamed Searle, and in default of both conditions to E in the same manner, &c.; and A married one whose surname was Cliff, and with him levied a fine, and suffered a recovery of the lands, in which she and her husband (with another party not material to the present point) were vouch'd; it was adjudged by the whole court, 1st, That the estate devised to A as a good estate in special tail; that is, to her and the heirs male of her body begotten by a Searle. 2d, That the words *upon condition*, &c., though express words of condition, should be taken to be words of limitation. 3d, That the estate-tale of A did not cease by her marrying a person whose name was not Searle, because she might possibly survive that husband, and afterwards marry a person whose name was Searle. 4th, That if the estate had been devised to A and the heirs of her body by a Searle to be begotten, *provided* and *upon condition*, that if she married any but a Searle,



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the estate should go over: a common recovery suffered before marriage, would bar the estate-tail and remainders: and her subsequent marriage with another would not avoid the recovery. || And the court took a difference between a collateral condition, and a condition which runs with the land: for if a donor reserves a rent with a condition to re-enter, a recovery will not bar it; otherwise, if it be to enter for non-payment of a sum in gross.||

Page v. Hayward, 2 Salk. 570; || 1 Mod. 108, 111; 2 Lev. 28.||

So, lands were devised to several persons successively in tail, and a clause was inserted by the testator to the effect following: viz. "Provided always, and this devise is expressly upon this condition, that whenever it shall happen that the said estates shall descend or come to any of the persons hereinbefore named, that he or they do and shall then change their surname, and take upon them and their heirs the name of W only, and not otherwise." But there was no devise over upon breach of the proviso. A, the first tenant in tail, two years after his coming to the possession of the estates, suffered a common recovery, in which he was vouched; but he never took upon him the surname of W. The person next in remainder entered for breach of the proviso in A's not having changed his name. The whole court agreed, that if this proviso were considered as a condition, it was collateral and subsequent, and was therefore destroyed by the recovery.

Gulliver v. Shuckburgh Ashby, 4 Burr. 1929.

A devised to his daughter an *express estate-tail*, but afterwards said, that such devise should be void as to *inheritance of heirs* if she should die *without issue*, and that in such case the estate should descend to his heir male. The daughter suffered a recovery to the use of herself in fee; such recovery is good.

Driver v. Edgar, Cowp. 379.

A person devised land to his eldest son Thomas for life, and if he died without issue living at the time of his death, then he devised the lands to another son and his heirs; but if Thomas had issue living at the time of his death, then the fee should remain to right heirs of Thomas for ever. Thomas entered upon the death of his father, and suffered a common recovery, and afterwards died without issue. It was resolved that Thomas was tenant for life, with a contingent remainder in fee to his right heirs, and that the contingent remainder was destroyed by the recovery.

Plunkett v. Holmes, 1 Lev. 11; Sir T. Raym. 28; Gilb. Uses, 133.

So, where lands were devised to A for life, without impeachment of waste; and in case he should have any issue male, then to such issue male, and his heirs for ever, and if he should die without issue male, then to B and his heirs for ever; A entered, suffered a common recovery, and died without issue; and it was held, that the remainders over being contingent, were barred by the recovery.

Loddingston v. Kime, 1 Ld. Raym. 203; Salk. 224; 3 Lev. 431; Fearn, 281; Carter v. Barnardiston, 1 P. Wms. 505; 2 Br. P. C. 1 S. P.; Doe v. Holme, 3 Wils. 237, S. P.; 2 Bl. Rep. 777, S. C.; Goodright v. Dunham, Dougl. 264; Goodright v. Billington, Ibid. 753, S. P.; Doe v. Burnsell, 6 T. R. 30; Doe v. Elves, 4 East, 313.

Lands were given to the use of A in tail, remainder to B, provided that if there be a failure of issue male of the body of A, and that J S shall have a rent-charge out of the land; A makes a lease of the land for one hundred

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years, and then suffers a recovery: it was adjudged, that this contingent rent was barred, and that J S should not charge the land during the term, for this grant is subsequent to the estate-tail, and cannot take effect till the determination of that; and then, consequently, can issue out of the remainders when they commence and execute: therefore, if the recovery bars the remainders dependent on the estate-tail, it must also destroy all charges which are to issue out of them; for when by the recovery it becomes impossible that the remainders should ever execute, the rent-charge which is to issue out of those remainders when executed, must necessarily be lost.

Benson v. Hudson, 2 Lev. 28; 1 Mod. 108, S. C.; 3 Keb. 274, 287, 292, S. C.

If tenant in tail levies an erroneous fine, and the conusee suffers a common recovery, in which the tenant in tail comes in as vouchee; this recovery shall bar the tenant in tail and his issue of a writ of error to reverse the fine, and the recoveror may plead the recovery in bar of the writ of error; for, since the tenant in tail by coming in as vouchee is barred of all right or title which he can have to the land, the writ of error, which is but a means to restore him to his right, must likewise be barred, since the recovery has left him no right to be restored to.

Barton v. Lever, Moore, 365; Cro. Eliz. 388, S. C.; Poph. 100, S. C.; 2 Atk. 201.

|| When A was seised in right of his wife of lands which she had by descent on the part of her mother; and he and his wife covenanted to levy a fine, which it was thereby declared should be to the use of the conusees and their heirs, to make them tenants to the *præcipe*, in order to suffer a common recovery, which recovery was afterwards suffered accordingly, and was by the same deed declared to enure to the use of the said A for life, remainder to the wife for life, remainder to the first and other sons of their two bodies in tail male, remainder to the right heirs of the wife; and A and his wife died without issue; a question was made, whether the lands should descend to the heir of the wife on the part of the mother, or on the part of the father? and judgment was given for the heir *ex parte maternâ*, for that the recovery did not alter the descent.

Abbot v. Burton, 11 Mod. 181.

Where John Tregonwell, being seised in fee of the lands in question, upon the marriage of Mary his eldest daughter with Francis Luttrell, by indenture executed in 1680, covenanted to levy a fine, and suffer a recovery, to the use of himself for life, remainder to his daughter Mary for life, remainder to the first and other sons of the said Mary by the said Francis Luttrell, remainder to the first and other sons of the said Mary by any other husband, remainder to his own right heirs in fee; a fine was levied and a recovery suffered to the uses of this indenture; on the death of Francis without issue male, the said Mary married Sir Jacob Banks, and had issue by him a son named Jacob, who, on the death of his father and mother, became seised of an estate-tail in the premises, and of the reversion in fee *ex parte maternâ*, and in the year 1720 suffered a recovery in the usual form, having by a deed of bargain and sale enrolled made a tenant to the *præcipe*, and thereby declared that the recovery should enure to the use of himself and his heirs; upon his death without issue, the question was whether the lands should descend to his heirs *ex parte paternâ*, or to those *ex parte maternâ*; and the Court of King's Bench gave judgment in favour of the heirs *ex parte paternâ*, which judgment was affirmed in the House of Lords. The ground of the decision was, that the tenant in tail took under

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the settlement as a *purchaser*, and not *by descent*; and, consequently, he took the fee acquired by the recovery in like manner, and therefore it was descendible to the heirs general. Had he taken by descent *ex parte maternâ*, the recovery would not have altered the line of descent.

Martin v. Strachan, 1 Str. 1179; 1 Wils. 66, S. C.; Willes, 444, S. C.; 5 T. R. 107, note S. C. This and the preceding and subsequent case show, that the point stated in Armstrong v. Wholesley, 2 Wils. 19, that under a recovery, the person suffering it gains a new estate to him and his heirs general, is not law. 6 Br. P. C. 319.

And the law is the same with respect to copyholds, as to freeholds, though a notion once prevailed, that a recovery of copyholds operated as a feoffment and re-enfeoffment, and, consequently, altered the descent.

Roe v. Baldwere, 5 T. R. 104.

A tenant in tail of an equitable estate has the same power to bind his issue, as a tenant in tail of a legal estate; and a recovery suffered by him will have precisely the same operation as a recovery suffered by a legal tenant in tail. It was once indeed (*a*) thought, that a recovery would not bar the remainders over; and it was afterwards holden, (*b*) that equitable estates-tail with the remainders over, might be barred by a common conveyance, or even by will. (*c*) But it is now settled, (*d*) that a fine or recovery is as essential to bar an equitable as a legal entail in a freehold estate; and the prevailing opinion (*e*) extends the rule even to copyhold estates, although Lord Hardwicke thought, that a surrender (*g*) would in all cases be sufficient.

Sugden's Gilb. Law of Uses, 58, n. 9; Washbourn v. Downes, 1 Ch. Ca. 213. (*a*) Lord Ditchby v. Langworth, Ibid. 68. (*b*) Carpenter v. Carpenter, 1 Vern. 440; Beverley v. Beverley, 2 Vern. 131; Bowater v. Elly, Ibid. 344; Br. Ch. 81. In 3 Ves. 277, Lord Chancellor Loughborough, after stating that Lord Clarendon, the chief justice, and the master of the Rolls, had thought a deed a sufficient bar in this case, is reported to have added, "I do not know why that was not adhered to, but that it makes more profit to the conveyancers." The reason why it was not adhered to, and a recovery was required, is neatly stated in the argument of the plaintiff's counsel in the case of Pigott v. Waller, 7 Ves. 105. "It appears at first surprising, that the same form of proceeding should be necessary to destroy an equitable as a legal estate-tail; the latter depending upon the recompense recovered over. The principle is however satisfactory. The party having the same quantity of interest ought to have the same disposing power for uniformity of judicial decision. If the equitable estate could be destroyed in any other way, the interest of the issue in tail would be less protected in equity than at law." (*c*) Woolnough v. Woolnough, 2 Vern. 228. (*d*) Legate v. Sewell, 1 P. Wms. 87; Kirkham v. Smith, Amb. 518; Boteler v. Allington, 1 Br. Ch. Rep. 68; Burnaby v. Griffin, 3 Ves. 266. See Fletcher v. Tollet, 5 Ves. 13. (*e*) Sugden's Law of Vendors, 165, 166, 4th edit. and Hale's case, Dec. 1764, there cited. See also Roe v. Lowe, 1 H. Bl. 446. (*g*) Radford v. Wilson, 3 Atk. 815. See also tit. *Copyhold* (C), *supra*, vol. ii. 372, and tit. *Estate in Tail*, *supra*, Vol. iii. 444.

A recovery of an equitable estate must, it has been said, in all (*h*) respects imitate a recovery of a legal estate, and therefore the person suffering an equitable recovery must have such an equitable estate, as, had it been a legal estate, would have entitled him to suffer a legal recovery.

Salin v. Thornton, 1 Br. Ch. Rep. 73, note. (*h*) In one point, it would seem that the analogy between a legal and an equitable recovery must fail, and that is as to the right of the equitable tenant in tail to suffer a recovery where there is in any case an adverse possession. "To make a legal tenant to the *præcipe*," the master of the Rolls observed, "it is absolutely necessary that there should be possession by seisin in fact or in law; but the equitable owner never has the legal seisin, often not the actual possession, and very frequently not even the right to call for either. In the one case, if you show that the possession was not in the party, and, consequently, would not pass from him, the purpose of the conveyance is frustrated; no legal freehold is acquired: but in the other case, it is not the object, nor ever can be the effect of the conveyance,

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to transfer the possession, but only to pass the equitable interest. One should suppose therefore," he added, "that the only inquiry would be, whether there was in the party such a quantum of equitable interest as entitled him to suffer an equitable recovery." Such was the reasoning of that learned judge in the case of Lord Grenville v. Blyth, 16 Ves. 224, in which, however, though the point was agitated, the question was not determined, his honour being of opinion that upon the facts of that case the possession could not be considered as adverse. The point had been moved before the same learned judge in a preceding case, that of Pigott v. Waller, 7 Ves. 98, but it not appearing that there was any possession in any one, except the person who suffered the recovery, the question of course did not arise." See Wynne v. Cookes, 1 Br. Ch. Rep. 515.

A recovery suffered by *cestui que trust* in tail, who is in possession under the trustees, will effectually bar such estate-tail, and all equitable remainders, and the equitable reversion expectant thereon; although there be no legal tenant to the *præcipe*.

Cruise on Recov. 271.||

Sir Francis North purchased certain lands in Essex from Richard Allington, who was *cestui que trust* in tail of them, with remainders over; and had suffered a common recovery; but there was no legal tenant to the *præcipe*, the freehold being in the trustees, who were not parties to the recovery. Yet decreed that the remainders expectant on the estate-tail were well barred by this recovery.

North v. Champernoon, 2 Chan. Ca. 63, 78, S. C.; 1 Vern. 13, S. C.; 1 P. Wms. 91, S. C.

Recoveries of this kind only operate on the trust estate whereof they are suffered, and the equitable remainders expectant thereon; but do not affect any legal estate, so that a legal remainder cannot be barred by an equitable recovery.

Robinson v. Cumming, Ca. temp. Talb. 167; 1 Atk. 473; 3 Ves. 276.

Thus, John Thornton being seised of the premises for life, with remainder to his first son, Thomas, in tail, remainder to his second son, James, in tail, forfeited in the rebellion in 1745. The estate for life being put up for sale by the commissioners was bought by Thomas, (the tenant in tail,) but in the name of a trustee. Thomas thus having the equitable estate for the life of his father, and the legal estate-tail, suffered a recovery, and soon after died, leaving issue a daughter, wife to the plaintiff. James, the second son, took possession, suffered a recovery, (after the death of his father and the trustee, in whom his estate vested,) and died, leaving two daughters, the defendants, who were in possession. The bill was filed by Salvin, in right of his wife, for an account of profits, and to have the estate delivered up. Upon the hearing at the Rolls, his honour ordered the bill to be retained for a year, with liberty for the plaintiff to try the validity of the recovery at law. But it was the opinion of the court, that Thomas's estate for life being an equitable estate, and his estate-tail a legal estate, he was not enabled to suffer either a perfect legal or a perfect equitable recovery, and therefore the recovery suffered operated nothing.

Salvin v. Thornton, cited in Br. Ch. Ca. 73; Amb. 545, 699, S. C., affirmed by Lord Camden on appeals from the Rolls.

In recoveries of this kind there must be an equitable tenant to the *præcipe*, that is, the trust estate must be conveyed to a third person, against whom the writ must be brought in the same manner as in recoveries of legal estates.

Cruise on Recov. 273.

If there be a *cestui que trust* for life before the *cestui que trust* in tail, so

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that in case the legal estate had been conveyed according to the trusts, the tenant in tail could not bar an estate-tail by a common recovery there, the *cestui que trust* in tail cannot bar his estate-tail by a recovery.

2 Ch. Ca. 64.

|| In analogy to the rule as to legal estates, the concurrence of the equitable tenant of the freehold is necessary to the validity of a recovery of an equitable estate. Although an equitable estate cannot, in suffering a recovery, be blended with a legal estate; yet it is no objection to a recovery by an equitable tenant in tail, that the tenant to the *præcipe* has the legal as well as equitable estate of freehold in him; for the analogy between recoveries of legal and equitable estates is sufficiently preserved by obtaining the concurrence of the person who is the beneficial owner.

1 Ch. Ca. 64; *Salvin v. Thornton*, *ubi supra*; *Goodrick v. Brown*, 2 Freem. 180; 1 Ch. Ca. 49, S. C.; *Philips v. Brydges*, 3 Ves. 120, and see Mr. Sugden's Treatise of the Law of Vendors, 287, 4th edit. See also *Wykham v. Wykham*, 18 Ves. 417, 418, 419.

A testator devised his estates, at B to C, E, F, and K in fee, in trust to pay his mortgages and debts, and after payment he directed them to convey the estates to the persons to whom he had devised his estates at T. He then devised his estates at T subject to a life-estate therein to his wife, the said C, to the said E, F, and K in fee, in trust out of the rents and profits to discharge his debts and mortgages, and to raise portions for his two granddaughters: and from and after such payment he devised his estates at T to the said E and his heirs, to the use of him and his heirs upon the trusts following, viz. to the use of his grandson F T W during his life, and after his decease to the use of the heirs male of his body, remainder to the said E in tail male, remainder to the said F in tail male, remainder to the said K in tail male, remainder to D in tail male, with the reversion to his own right heirs. The testator's wife died in his lifetime. On the death of the testator in 1764, a bill was filed in the name of F T W, then an infant, to have the trusts of the will carried into execution; and by a decree in 1765 the will was established, and the usual directions were given. No farther proceedings took place. In 1772, F T W came of age; and the trustees under the will having sold part of the estates for payment of the debts, put him in possession of the rest: but no conveyance of the legal estate was executed. In 1772 and 1780, E and F, two of the trustees and devisees in tail in remainder died. In 1785, the devised estates were conveyed by lease and release, by F T W to J P, in order to make a tenant to the *præcipe*, and a recovery was shortly afterwards suffered of them to the use of F T W in fee. K, the only surviving trustee, in whom the legal estate was vested, did not join in this transaction. Part of the estates were afterwards settled on the marriage of F T W, and by his will he devised the remainder, and died without issue male. K also died. A bill being filed after the death of F to revive the proceedings in the former cause, and praying that the defendant, the son of K, might be decreed to convey the estates settled on the marriage of F T W to the uses of the settlement, and to convey such of the estates as were sold to the use of the purchasers, and the residue to the uses of the will of F T W; the defendant insisted, that by the union of the equitable and legal estates in his father K, he had a legal remainder in tail in the estates, whereof the recovery was suffered; and therefore such remainder was not barred for want of a legal tenant to the *præcipe*. But it was decreed that K was only trustee for himself in remainder after an estate-tail in

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F T W ; and that therefore the recovery well barred that remainder : that K's equitable interest did not merge in his legal interest, inasmuch as it was not commensurate and co-existent with it ; that an estate in fee may exist in a trustee, and a partial interest in the equitable estate may at the same time subsist for the benefit of such trustee.

Philips v. Brydges, *ubi supra*. It has been already determined, in Marwood v. Turner, 3 P. Wms. 171, that where a man is seised of the legal fee in trust for himself in tail, his recovery will bar the equitable estate-tail, and all ulterior interests ; for the estates are considered as totally distinct.

Where an estate was devised to trustees, and their heirs in trust to receive and pay over the rents and profits to a married woman for life to her separate use ; and after her decease to convey the estate to her daughters as tenants in common in tail ; Lord Loughborough held, that she took an equitable estate for life ; and that a conveyance from her and her husband by lease and release was sufficient to make a good equitable tenant to the *præcipe*.

Barnaby v. Griffin, 3 Ves. 266. ||

Where an estate tail is conveyed or devised to trustees and their heirs, upon trust to pay debts, or such debts as are specified, and after payment of such debts, or when such debts shall be paid, then in trust for A B, or in trust to convey such parts of the estate as shall remain unsold to A B ; in either of those cases A B has a trust estate in the surplus, vested in him immediately upon the execution of the deed, or the death of the testator, and may suffer an equitable recovery of such estate.

See Cruise on Recov. 274.]

(D) Of erroneous and void Recoveries, who may avoid them, and by what Method.

It is already observed, that a recovery suffered by an infant in person shall not bind him : but though he may avoid it, yet it cannot be done by an entry *in pais*, but by writ of error, and this too during his minority ; for the judgment of the court being on record must be set aside by an act of equal notoriety. And an infant may avoid a recovery by writ of error, as well where he comes in as a vouchee, as where he is tenant to the *præcipe* ; for though strictly speaking the recovery is not against him where he is not tenant to the *præcipe*, yet for the greater security of the purchaser, and to strengthen the recovery by the use of the double voucher, the person who really has the right to the land in demand comes in as vouchee, and then by vouching over the common vouchee, has one recompense for all his titles ; and consequently, if he be the person that really loses the land, he ought in reason to reverse the recovery, as well where he comes in as a vouchee, as where he is seised of the land, and is tenant to the *præcipe*.

Ro. Abr. 731, 742 ; Lev. 142.

If tenant in tail within age comes in as vouchee by attorney in a common recovery, he in remainder may assign this for error, for he is party in (a) interest to the recovery ; and where a man's interest is bound by another's act, it is but reasonable he should be allowed to free himself from the mischief of it by taking advantage of any error in it.

Ro. Abr. 755, 796. (a) But he must have the immediate interest, for where a writ of error was brought in B. R. to reverse a common recovery, and there was a *scire facias* issued against all the tenants, and they made a default ; though the recovery was reversed, yet it appearing afterwards that the plaintiff in the writ of error had no title, there being a remainder-man before him, the court reversed their former reversal. 5 Mod. 196. [The right to bring a writ of error descends to the person to whom the

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land would have descended in case the recovery had not been suffered. *Henningham v. Windham*, 1 Leon. 261. But it is not required of the plaintiff in error to set forth a complete title in the writ. *Sheepshanks v. Lucas*, 1 Burr. 412.]

[Although nothing can be assigned for error which contradicts the record: as incapacity in a vouchee, where he appeared in person; yet, if a vouchee appear by attorney, an averment may be then made, either that such vouchee died before the day on which judgment was given, or that he laboured under some personal disability which rendered him incapable of suffering a recovery; for this is matter collateral to the record, and triable by a jury.

*Wynne v. Wynne*, 1 Wils. 42; *Cruise on Recov.* § 83; *Swan v. Broome*, 3 Burr. 1595; 1 Bl. Rep. 496, 526; 6 Br. P. C. 132; *Hume v. Burton*, *Cruise on Recov. Append.*]

If A be tenant in tail, the remainder to B, and A suffer an erroneous recovery, and the common vouchee release to the recoveror; yet, if A die without issue, B may, notwithstanding the release, reverse it by writ of error; for the common vouchee is only called in for form; and as he has really no interest in or title to the land, so really neither does he make any recompense to the person that loses the land; and therefore it were unreasonable to carry the notion of the imaginary recompense so far as to suppose him a real sufferer, thereby giving him the privilege of setting aside a conveyance by which he is no way affected.

*Cro. Eliz.* 2, 3; *Lord Norris v. Marquis of Winchester*.

In a writ of error to reverse a recovery suffered by an infant, who appeared by guardian, the error assigned was in the entry of his admission by guardian, viz. *concess. est per curiam hic quod A B sequatur pro J S armig. qui infra atat. existit ut guardianus prædict. J S*, whereas it was objected, that since the infant was tenant to the writ, it ought to have been entered, that the guardian was admitted to defend for the infant; but this exception was disallowed, because the words *ad sequend.* for the infant signify the same with *ad defendend.* for the infant; for *ad sequend.* is to follow and attend the business and suit of the infant; and the guardian being assigned to do that, must likewise have been assigned to take care of, or to take upon him the defence of the infant's suit.

*Hesketh v. Lee*, 2 Saund. 94, 95; 1 Mod. 48, S. C.; 1 Sid. 446, S. C.; 1 Ventr. 73, S. C.; 2 Keb. 627, S. C.

[In a writ of error in the King's Bench in Ireland, the case was, that in a writ of error to reverse a common recovery, the defendant pleaded that he was an infant, and prayed that the parol might demur. To this the plaintiff demurred; and judgment was given that the parol should demur; which judgment was affirmed.—*Note*, to the writ of error in this court, the defendant again pleaded his infancy, and prayed the parol might demur, which was disallowed. *Non datur enim exceptio ejusdem rei cujus petitur dissolutio*.

*Fortescue Aland v. Malone*, Fitzg. 114.

A recovery ought not to be reversed, unless writs of *scire facias* are issued against the tertendants and the heir; (a) because the errors in a recovery ought not to be examined, until all the parties interested in supporting it are before the court.

*Lord Pembroke's case*, Rep. temp. Holt, 614. But the issuing of writs of *scire facias* to the tertendants is not deemed to be *ex necessitate juris*, but only discretionary in the court. *Kingston v. Herbert*, 2 Show. 490; 3 Mod. 119; Carth. 111; Skin. 273. And per Lord Mansfield, by the established mode of proceeding, there must be a *scire facias* against the tertendants, otherwise it is an irregularity, but no more. *Hall v. Woodcock*, 1 Burr. 359.] (a) || Against the heir there is no necessity for a *scire facias*. *Sheepshanks v. Lucas*, *Ibid.* 412. ||

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In a common recovery the writ of entry bears date 1 *Martii* 7 *Eliz. ret. die lune in quartâ septimanâ quadragesim. proxim. futur.*, the first day of March being that year the first day of Lent; the recovery passed in the usual form that Lent; and in a writ of error to reverse it, the error assigned was, that the words *proxim. futur.* should be referred to *quadragesim.*, and then the writ of entry was not returned till Monday in the fourth week of Lent, 8 *Eliz.*, which was the time the tenant was to appear; and consequently, this recovery must be void, because here was judgment upon a voucher, and a recovery in value, before the writ was returned, before which the court has no power to proceed. But it was answered and resolved, that since *proxim. futur.* were not written at large, they may be indifferently applied either to *die lune*, by supposing them to stand for *proximo futuro*, or to *quartâ septimanâ*, by supposing them to stand for *proximâ futurâ*; and where words abbreviated may be indifferently referred, it is but reasonable to give such a relation as will best support the recovery, which is but a voluntary conveyance, *ut res magis valeat quam pereat*. But, if the words had been at large *proximæ futuræ*, then they must necessarily be referred to *quadragesimæ*, and then the objection had been good, and the recovery for that reason must have been void.

Barton's case, Poph. 100; Cro. El. 388.

In error to reverse a recovery, the errors assigned were, 1. That the writ of entry was brought of an advowson of a rectory, and also of a rent issuing out of the same rectory, which was a *bis petitum*, and therefore the writ vitious. But this was disallowed, because the advowson and rectory are different things; for he that has the advowson has only the right of presentation, but he that has the rectory has the profits of the church, out of which the rent issues; and, consequently, there can be no *bis petitum* in this case, because by the demand of the advowson of the rectory, and of the rent issuing out of the rectory, the demandant recovers more than by a demand of the rectory only. Another error assigned was, in the demand of a rent or pension of four marks issuing out of the rectory, which is too uncertain a demand, a pension being a different thing from a rent, and recoverable in the spiritual court. But this too was disallowed, because it is plain there is but one sum of four marks demanded, and the pension or rent must be synonymous here, because they are demanded as issuing out of the rectory; and therefore, the pension cannot be in nature of an annuity, which charges the person only, because it is expressly to issue out of the rectory.

Poph. 33; 5 Co. 40; 5 Co. 41 a; Poph. 23.

[A common recovery was suffered, but no writ of entry was filed; in consequence of which, a writ of error was brought. It was moved that it might be examined, whether any writ of entry had been filed or not: but the court denied it, though if it appear upon record that a writ has been filed, then they would consider, whether a new writ should be filed or not. And it was said, that if a recovery was exemplified pursuant to the statute 23 *Eliz.* though some part of it was lost, yet it would be aided.

Anon. Lit. Rep. 299.

By a rule of the court of C. P. made Tr. 30 *Geo.* 3, "It is ordered, that from and after the first day of Michaelmas term then next ensuing, in every common recovery wherein the vouchee or vouchees shall personally appear at the bar of that court for the purpose of suffering such recovery, the writ of entry shall be sued out and produced, at the time of the recording of the



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vouchee's or vouchees' appearance at bar, at the foot of the *præcipe* in such recovery."

1 H. Bl. 526.]

In a writ of error to reverse a common recovery, the error insisted on was, that the warrant of attorney of the vouchee bore date before the *summones ad warrantizand.* issued. Yet the judgment was affirmed, because the vouchee may come in, if he will, before the *summones ad warrantizand.* and make his attorney; and therefore, to support the common recovery, it shall be presumed the vouchee was present in court and appointed his attorney; and so the *dedimus* for the warrant and the *summones ad warrantizand.* void.

Win v. Floyd, 1 Sid. 213; 1 Lev. 130, S. C.; Raym. 70, 96, S. C.

[The Court of Common Pleas will not enlarge the return of a writ of summons, so as to make a term intervene between the teste and return.

Barnard v. Woodcock, 2 Bl. Rep. 1201; Gibbons v. Stevenson, Ibid. 1223.]

In a *quare impedit* the plaintiff entitles himself to an advowson by a recovery suffered by a tenant in tail; in pleading which recovery he alleges two to be tenants to the *præcipe*, but doth not show how they came to be so, or what conveyance was made to them, by which it may appear that they were tenants to the *præcipe*; and after search of precedents as to the form of pleading common recoveries, the court inclined that it was not well pleaded, but delivered no judgment.

Wakeman v. Blackwell, 2 Mod. 70; 1 Mod. 218, S. C., but the plea adjudged bad. See 2 Lutw. 1549.

[By statute 10 and 11 W. 3, c. 14, the writ of error to avoid a recovery must be brought within twenty years; which twenty years are to be reckoned, it hath been adjudged, not from the time when the title accrued to the person seeking to avoid it, but from the time when the recovery was suffered.

Lloyd v. Vaughan, 2 Str. 1257.

Although none but those who have an immediate interest in the lands are allowed to bring a writ of error to reverse a recovery; yet it is permitted to strangers whose interests are affected by a recovery to falsify it. And a recovery may be falsified by several ways: 1. By entry and plea. 2. By action. 3. By action and plea. 4. By plea only. By entry and plea, when the party's entry is not taken away by the recovery and he brings an assize, and the recovery is pleaded against him, then he pleads matter to avoid the recovery.

Cruise on Recov. § 300; Booth, 77; Pigot, 156; 3 Reeves, 362. Hence too it may be invalidated on a trial in ejectment, as in 2 Ves. 403, and 3 Atk. 313, *supr.* B.

A recovery may also be falsified by action and plea, when the entry of the party that hath right is taken away by the recovery, and upon a real action brought, the recovery is pleaded in bar of his right. This may be falsified by plea.

Booth. 77; 6 Co. 8 b.

By the common law, if the tenant of the freehold had suffered a common recovery, it operated as a good bar to all terms for years derived out of the freehold; for the person who recovered the lands was supposed to come in by a title paramount, so that he was not bound by the leases of the person against whom he recovered. Besides, a termor for years could not in any case falsify a common recovery.

Co. Lit. 46 a; Plowd. 83.

(D) Of erroneous and void Recoveries, &amp;c.

By the statute of Gloucester, 1 Edw. 1, c. 11, a remedy was given to the lessee for years, by way of receipt and trial, whether the recovery was upon good title, or by way of collusion, and in case it appeared that the recovery was by collusion, then the lessee for years was permitted to enjoy his term, and the execution was stayed until the determination of the term.

The operation of this statute not having been found sufficiently extensive, another act was made 21 Hen. 8, c. 15, whereby it was provided that a tenant for years might falsify a feigned recovery had against the person in reversion; and that no estate held by statute-merchant, staple, or elegit, should be avoided by means of any feigned recovery.

Bro. Abr. tit. *Lease*, 26; Fitz. N. B. 198 and 220; Vaugh. 127.

A recovery, as well as a fine, may be invalidated by the Court of Chancery: for where it appears to have been unduly obtained, that court will either compel the recoveror to convey the estate to the person who is entitled in equity to have it, or declare the recoveror to be a trustee for such person.

*Ferres v. Ferres*, 2 Eq. Ca. Abr. 695; *Stanhope v. Thacker*, Pr. Ch. 435.]

|| On the other hand, where a person is prevented from suffering a recovery by force and management, the Court of Chancery will compel the parties to act as if a recovery had been suffered. As, where Lord Waltham being tenant in tail, and meaning to suffer a recovery, and by will to give real interests to his wife, Mr. Luttrell, who by his marriage had an interest to prevent the entail from being barred, did, by force and management, prevent the testator from executing the deed to make the tenant to the *præcipe*; Lord Thurlowe's opinion was clear, that though, at law, Mr. Luttrell's lady was tenant in tail, and, which made it stronger, was no party to the transaction, yet neither he nor any one else could have the benefit of the fraud; and the jury, upon an issue directed, having found that the recovery was fraudulently prevented, Lord Thurlowe held, even in favour of a volunteer, that the tenant in tail should not take advantage of the iniquitous act, though she was not a party to it; and the estate was considered exactly as if the recovery had been suffered.

*Luttrell v. Olmius*, 11 Ves. 638.||

[The Court of Common Pleas will permit an amendment of recoveries, as well as of fines, where an evident mistake has been made in the names or descriptions of the parties, (a) or in the description of the estates, (b) or when there has been a clerical mistake in the entry of the judgment, (c) or in the teste or return of the writ of entry, (d) or in the return of the writ of seisin. (e)]

(a) *Pinde v. Norton*, Dy. 105; *Chapman v. Bacon*, Pigot, 170; *Thurban v. Pantry*, Ibid. 171; *Mayor v. Coulthaid*, 2 Bl. Rep. 1230; Lord and Biscoe, Barnes, 24. (b) *Skinner v. Land*, Pigot, 172; *Brooke v. Biddulph*, Ibid.; *Henzel v. Lodge*, 2 Bl. Rep. 747; 3 Wils. 154; *Watson v. Cox*, 2 Bl. Rep. 1065. (c) Barnes, 20, 22. (d) 8 Co. 159 b; 4 Taunt. 644, 855; 5 Taunt. 259; 1 Bos. & Pul. 137; *Wilton v. Fairfax*, Barnes, 23. (e) *Watson v. Lockley*, 2 Wils. 2.]

|| So, where a recovery is erroneous, because no writ of seisin is awarded, nor the judgment executed by a writ of seisin returned on the roll, the Court of Common Pleas will, after a writ of error is brought to reverse the recovery for that error, rectify the defect in the record, by ordering a writ of seisin to be awarded on the roll, and return executed; for no writ of seisin is ever in fact executed.

*Per. Lord Kenyon*, in *Goodright v. Rigby*, 5 T. R. 179.||

[But an amendment will not be permitted on affidavit only: it must ap-

(D) Of erroneous and void Recoveries, &amp;c.

pear on the face of the deed to lead the uses, that there is sufficient ground for it.

1 H. Bl. 72.

Nor will it be allowed in the description of the estates comprehended in a recovery, where the recovery, as it stands, has lands of the vouchee to operate upon.

Acton v. Baldwin, 2 Bl. Rep. 874.

And, in general, no amendment will be allowed unless there is an evident mistake of the clerk, or something to amend by.

1 Wils. 35 : Cruise on Recov. § 83.]

|| In applying to amend, it is not necessary to show more of the title, than a seisin in tail of the vouchee.

Simeon v. Wakeford, 4 Taunt. 155.

Neither the deed of uses nor the warrant of attorney can be altered by the court.

Steele v. Clennel, 6 Taunt. 145 ; Forster v. Forster, Ibid. 373 ; Fox v. Benbow, Ibid. 652.

By a rule M. 39, G. 3, no common recovery or fine shall be suffered to pass ; unless the taking of the warrant of attorney for suffering any common recovery or caption of any fine be before any of the justices or barons of his majesty's courts of record in Westminster-Hall, or one of the serjeants at law, unless an affidavit be made and filed, stating that the commissioners taking the same, are, to the best of the defendant's information and belief, either barristers of five years' standing, or solicitors or attorneys of some of the courts in Westminster-Hall, the judges of the Court of Session and Exchequer, or advocates and clerks to the signet of five years' standing in Scotland.

Under this rule neither an attorney of the court of great sessions at Chester, nor an attorney of the court of Great Sessions in Wales, is competent to take the acknowledgment of the warrant of attorney. The warrant, if so taken, is a nullity.

Blagrove v. Owen, 3 Taunt. 302 ; Mullins v. —, 4 Taunt. 584.

Where the affidavit stated that the commissioner was an attorney of the Court of King's Bench, it was suffered to pass, though the words "at Westminster" were omitted. In a subsequent case (a) those words were permitted to be added by a supplemental affidavit.

Mander v. Hookney, 5 Taunt. 263. (a) Hardy v. Prior, Ibid. 855.

Where the defendant was one of the two commissioners who had taken the acknowledgment, and returned the writ, the court would not permit the recovery to pass. Nor would they, (b) where the attorney upon the record was one of the commissioners.

Rawle v. Pyke, 5 Taunt. 747. (b) Shaw v. Ware, 4 Taunt. 590.

If the acknowledgment of the vouchees is taken abroad, the notarial certificate which is required by the rule of court of H. 14 G. 3, *supra*, 261, to authenticate the affidavit of the commissioners, must distinctly state, that the affidavit was sworn, it must not leave it to be collected by inference. But, if it be apparent that the signature of the magistrate before whom the affidavit was sworn, must be his, the recovery will pass, though the notarial certificate omit to state it to be so.

Laidlaw v. Cox, 2 Taunt. 205 ; Hubert v. Humphreys, 5 Taunt. 197.

(D) Of erroneous and void Recoveries, &amp;c.

Where the warrant of attorney was acknowledged in a part of the East Indies far distant from the residence of any notary public or British magistrate, the affidavit of the acknowledgment made before the British consul or agent there was admitted; but the court required an affidavit of these facts from the chairman or secretary of the East India Company, and also an affidavit that the acknowledgment of the warrant of attorney was taken before two commissioners.

Domville v. Kinderley, 3 Taunt. 275.

Although the warrant of attorney of the several vouchees ought to be joint, that is, all on one piece of parchment; yet where two of three vouchees had given one joint warrant of attorney, and the third had given his on a separate piece of parchment, the court allowed the recovery to pass. But, in a later case, where the several vouchees had acknowledged separate warrants of attorney, though upon the same piece of parchment, the court were clearly of opinion that the warrant could not be amended, and the recovery could not pass; because, notwithstanding all the vouchees had appointed the same attorney, yet it did not from thence follow but that he might be appointed by the different parties for separate purposes.

Lang v. Lee, 1 Bos. & Pull. 31; Jennings v. Street, 3 Bos. & Pull. 361. So Balch v. Phelps, Ibid. 368, *supra*, 260.

A recovery has been permitted to be amended, by inserting the words, "*ac etiam advocacionem, presentationem, donationem, nominationem, liberam dispositionem, et jus patronatûs ecclesiæ de C ac advocacionem, presentationem, donationem, liberam dispositionem et jus patronatûs de curatione de C.*" But in a later case upon an application to amend a recovery by inserting the words "Advowson of Beeston St. Lawrence, and curacy of Ashmenhaugh," the court granted it as to the advowson, but as to the right of nominating a perpetual curate, they said it was not the subject of a recovery; it was a thing unknown to the law; it is a parcel of the rectory.

Milbanke v. Joliffe, 2 Bos. & Pul. 579, note; Horne v. Lodge, 3 Taunt. 462.

See st. 23 El. c. 3, § 10, and 27 El. c. 9, § 10, and *supra*, vol. iii. 380.—See st. 39 and 40 G. 3, c. 56, (commonly called "Lord Eldon's act,") *supra*, vol. iii. 444; and st. 58 G. 3, c. 46, the same enactment in the very same words for Ireland.||

|| Where one of the vouchees became insane, between the time of executing the warrant of attorney and the passing of the recovery, the court refused to let it pass as to him, but permitted it as to the other parties.

Vale and others, Vouchees, 5 Bing. 176.

Meadow will pass in a recovery under the word land, and the court will not amend by adding the word "meadow."

4 Bing. 90.

In a recovery, "calleth to warrant" is an improper expression.

4 Bing. 101.

The court refused to amend a recovery by altering Berks into Bucks.

4 Bing. 426; and see Ibid. 425, and 7 Bing. 455.

Where a lease and release were made to create a tenant to the *præcipe* in a recovery, and the lease was lost, it was held to be a case to which relief applies under 14 G. 2, c. 20, § 5.

Holmes v. Aislaby, 1 Madd. 551.||

## FORCIBLE ENTRY AND DETAINER.

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At common law, if a man had a right of entry in him, he was permitted to enter with force and arms, and to detain his possession by force, where his entry was lawful. (a) This created a great inconvenience by arming the tenants of the lords, and in a manner encouraging those in mischief, who were always too forward in rebellions and contentions in their neighbourhood: also, it gave an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbours.

Dalton's Justice, 297; Lamb. 135; Crom. 70 a, b. (a) || This dictum, that at common law a party may enter by force into that to which he has a legal title, is not to be implicitly received; though it would rather seem that he had such a right, exercisable however under certain limitations. Bract. 162, 163. But there can be no doubt that an unlawful entry with force is an offence at common law, for which an indictment will lie, provided the indictment charge the defendants with having used such force as constitutes a breach of the public peace. R. v. Bathurst, Say. Rep. 225; R. v. Storr, 3 Burr. 1698; R. v. Bate, Ibid. 1731. The words "*vi et armis*" do not of themselves impute that degree of force, for it is no more than what the law ascribes to every common trespass or entry upon land. R. v. Storr, and R. v. Bote; but the words "*manu forti*" import something criminal in its nature, something more than is meant by the words "*vi et armis*," and sufficiently distinguish this kind of entry from an ordinary trespass. R. v. Wilson, 8 T. R. 357; Sty. 135; Rast. Entr. 354. ||

The legislature, therefore, finding it necessary to interpose, we will set down and consider,

- (A) The several Statutes made relating to this Subject.
  - (B) What shall be a forcible Entry and Detainer within these Statutes.
  - (C) Of the Nature of the Possessions with respect to which one may be guilty of a forcible Entry or Detainer.
  - (D) What Persons may be guilty thereof.
  - (E) What ought to be the Form of a Record grounded upon these Statutes.
  - (F) Of the awarding of Restitution, by whom, and in what Manner: And herein of the Nature of the Possessions, and to whom such restitution is to be made.
  - (G) What shall be a Bar or Stay to such Award of Restitution: And herein of superseding and setting it aside after it is executed.
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(A) The several Statutes made relating to this Subject.

By the 2 Ed. 3, c. 3, called the statute of Northampton, it is enacted, that "no man, great nor small, of what condition soever he be, except the king's servants in his presence, and the king's officers in doing execution of the king's precepts, (*mandamentz le Roi*), or of their office, and those who are in their company aiding them, and also upon a cry made for arms to keep the peace, and that in the places where such acts shall happen, be so hardy as to come, before the king's justices or other ministers of the king in the execution of their offices, with force and arms, nor to bring any force in affray of the peace, nor to ride (b) nor go armed neither by night, nor by day, in fairs, markets, nor in the presence of the justices, nor other ministers, nor in no part elsewhere, upon pain of forfeiting their arms to the king, and their bodies to prison at the king's pleasure. (c)

Plowd. 86. Upon this statute there was a writ formed to take and appraise the arms  
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(A) The several Statutes made relating to this Subject.

of such as rode armed, and also to take and imprison their bodies ; for which vide F. N. B. 249. But this was no sufficient provision against the entering and detaining possession by force. (b) [The word in the original is "chivaucher," the proper meaning of which cannot be given now in a direct translation. It occurs in almost every chapter of Froissart, and generally implies a military armament with numbers. See 1 Luders' Tracts, 8, 141. (c) Lord Coke, in 3 Inst. 160, in reciting this statute, adds, "and make fine and ransom to the king." But these words are not in the authentic edition of the statutes published by the king's command : nor do they appear in the writ in Fitzherbert formed upon this statute.]

By the 5 R. 2, c. 7, "The king defendeth, that none thenceforth make entry into any lands and tenements, but in cases where entry is given by the law ; and in that case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner ; and if any man henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will."

[Rot. Parl. vol. iii. p. 114, nu. 71. In the time of Bracton a person disseised might recover seisin by force, with a multitude of friends to assist him, provided he made the attempt *flagrante disseisinâ*. Bract. 162, 163. But these forcible vindications of a man's property being thought incompatible with a well-ordered government, this statute was made ; so that a disseisee, if he entered with force, became punishable in the same manner as a disseisor with force had been before.] But this statute gave no speedy remedy, leaving the party injured to the common course of proceeding by way of indictment or action, and made no provision at all against forcible detainers.

By the 15 R. 2, c. 2, "It is accorded and assented, that the statutes and ordinances made and not repealed of them who make entries with strong hand into lands and tenements or other possessions whatsoever, and them hold with force, and also, &c., be holden, and kept, and fully executed ; and added thereto, that at all times that such forcible entries be made, and complaint thereof come to the justices of peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where the force is made ; and if they find any that hold such place forcibly, after such entry made, they shall be taken and put into the next jail, there to abide, convict by the record of the same justices or justice, until they have made fine and ransom to the king ; and that all the people of the county, as well the sheriff as others, shall be attendant upon the same justices, to go and assist the same justices to arrest such offenders, upon pain of imprisonment, and to make fine (a) to the king. And in the same manner it shall be done of them that make such forcible intries into benefices or offices of holy church."

(a) [The justices must set the fine, and they must do it before they commit the offender, though they take a reasonable time to consider of it. But, if no fine is set by the justices, the King's Bench cannot set it ; but, upon having the proceedings removed before them by *certiorari*, will quash the conviction. R. v. Elwell, 2 Str. 794 ; 2 Ld. Raym. 1515 ; R. v. Layton, 1 Salk. 353. The conviction too will be quashed if there be no adjudication that the person upon whom the fine is imposed shall be committed until it is paid. R. v. Lord Say, Rep. 176. And the fine must be assessed upon every offender separately, and not upon the offenders jointly : and the justice ought to estreat the fine, and to send the estreat into the exchequer, that from thence the sheriff may be commanded to levy it for his majesty's use. Dalt. c. 44. But upon payment of the fine to the sheriff, or upon sureties found (by recognisance) for the payment thereof, it seemeth, that the justice may deliver the offenders out of prison again at his pleasure. Ibid.]

By the statute of 8 H. 6, c. 9, after reciting the statute of 15 R. 2, "And for that the said statute doth not extend to entries into tenements in peaceable manner and after holden with force, nor if the persons who enter with force into lands or tenements be removed and voided before the coming of

(A) The several Statutes made relating to this Subject.

the said justices or justice, as before, nor any pain ordained, if the sheriff do not obey the commands and precepts of the said justices, to execute the said ordinance, many wrongful and forcible entries be made from one day to another into lands and tenements by those who have no right. And also divers gifts, feoffments, and discontinuances sometimes made to lords, and other puissant persons, and extortioners within the counties where they be conversant to have maintenance, and sometimes to such persons as be unknown to them so put out with intent to delay and defraud such rightful possessors of their right and recovery for ever, to the final disherison of divers of the king's faithful liege people, and it is likely daily to increase, if due remedy be not provided in this behalf: Our lord the king, considering the premises, hath ordained, that the said statute and all other statutes of such entries and alienations before made shall be holden and duly executed; in addition thereto, that henceforth where any doth make any forcible entry into lands, tenements, or other possessions, or them hold forcibly after complaint thereof made, within the same county where such entry is made, to the justices of the peace, or to one of them by the party grieved, that the justices or justice so warned within a convenient time, shall cause the said statute to be duly executed, and that at the costs of the party so grieved."

"And moreover, though such persons making such entries be present, or else departed before the coming of the said justices or justice, nevertheless the same justices or justice, in some good town next to the tenements so entered, or in some convenient place, according to their discretion, shall have, and each of them shall have authority and power to inquire by the people of the same county, as well of them that make such forcible entries into lands and tenements, as of them who hold the same with force; and if it be found before any of them, that any doth contrary to this statute, then the said justices or justice shall cause to reseize the lands and tenements so entered or holden as aforesaid, and shall put the party, so put out, in full possession of the same lands and tenements so entered or holden as before."

"And also, that when the said justices or justice make such inquiries as before, they shall make, or one of them shall make, their warrants and precepts to be directed to the sheriff of the same county, commanding him, on the king's behalf, to cause to come before them, and every of them, sufficient and indifferent persons, dwelling next about the lands so entered as before, to inquire of such entries; whereof every man who shall be empanelled to inquire in this behalf, shall have land or tenement of the yearly value of forty shillings by the year at least, above reprises; and that the sheriff return issues upon every of them; at the day of the first precept returnable twenty shillings, and at the second day forty shillings, and at the third time an hundred shillings, and at every day after the double. And if any sheriff or bailiff within a franchise, having return of the king's writ, be slack and make not execution duly of the said precepts to him directed to make such inquiries, that he shall forfeit to the king twenty pounds for every default, and moreover shall make fine and ransom to the king.

"And that as well the justices or justice aforesaid, as the justices of assizes, at their coming into the country to take assizes, shall have, and every of them shall have, power to hear and determine such defaults and negligences of the said sheriffs and bailiffs, and every of them, as well by bill at the suit of the party grieved, for himself, as for the king, to sue by indietment only to be taken for the king.

"And moreover, if any person be ousted, or disseised of any lands or

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tenements in a forcible manner, or put out peaceably, and afterwards kept thereout with strong hand; or after such entry any feoffment or discontinuance in any wise thereof be made to defraud and take away the right of the possessor, that the party grieved in that behalf shall have assize of novel disseisin, or writ of trespass against such disseisor. And if the party grieved recover by assize, or by action of trespass, and it be found by verdict or in other manner by due form in law, that the party defendant entered with force into the lands and tenements, or them with force after his entry held, that the plaintiff shall recover his treble damages against the defendant; and moreover, that he make fine and ransom to the king. And that mayors, justices, or justice of the peace, sheriffs and bailiffs of cities, towns, and boroughs, having franchise, have in the said cities, towns, and boroughs, like power to remove such entries, and in other articles aforesaid, arising within the same, as the justices of peace and sheriffs in counties and countries aforesaid have."

"Provided always, that they who keep by force their possessions in any lands or tenements, whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possessions therein by *three* years or more, be not endamaged by force of this statute."

*Note:* this statute having founded a remedy by assize of *novel disseisin*, or action of trespass, to recover the treble damages, if the defendant pleads the matter in bar to it, he must also traverse the force; but, if the matter in bar be found for the defendant, so that he hath good title at law, the defendant is excused from the force, for the plaintiff cannot recover in the action if he hath no right. But, if the plaintiff prevails, then the force must be inquired of, and treble damages assessed to the plaintiff. But a person is punished criminally for entering with force even where he has a right, though not for peaceably detaining a possession by force, especially, if he has holden it for *three* years in quiet. F. N. B. 249; Bro. tit. *Force*, 5, 11, 29; 17 H. 7, 17 b.

β Where an inquisition for a forcible entry, under 8 Hen. 6, c. 9, omitted to set forth the interest of the party possessed in the premises in dispute, the court quashed it, and awarded a writ of restitution.

Reg. v. Bowser, 8 Dowl. 128; the same point was ruled under the statute 21 Jac. 1. State v. Butler, 1 Tayl. 262.g

By the 31 Eliz. c. 11, the proviso in the last statute is farther enforced and explained, and it is declared and enacted, "That no restitution upon any indictment of forcible entry, or holding with force, be made to any person, if the person so indicted hath had the occupation, or been in quiet possession for the space of *three* whole years together next before the day of such indictment so found, and his estate therein not ended, which the party indicted may allege for stay of restitution, and restitution to stay till that be tried, if the other will deny or traverse the same; and if the same allegation be tried against the same person so indicted, he is to pay such costs and damages to the other party as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied, as is usual for costs and damages contained in judgments upon other actions."

By the 21 Jac. 1, c. 15, it is enacted, "That such judges, justices, or justice of the peace, as by reason of any act or acts of parliament now in force, are authorized and enabled upon inquiry, to give restitution of possession unto tenants, of any estate of freehold of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall by reason of this present act have the like and the same authority and ability from henceforth (upon indictment of such forcible entries, or forcible



(B) What shall be a forcible Entry and Detainer.

withholdings before them duly found) to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knight-service, tenants by *elegit*, statute-merchant and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force."

||An indictment for forcible entry may be maintained at common law, though the statutes give other remedies to the party grieved, provided the indictment charge the defendants with having used such force as constitutes a public breach of the peace.

Rex v. Wilson, 8 Term R. 357.

*Quære.* If a party having only a possessory interest, and not a freehold, can maintain trespass for forcible entry under these statutes.

- Kemp v. Richardson, 2 Moo. 238.||

(B) What shall be a forcible Entry and Detainer within these Statutes.

A FORCIBLE entry must regularly be with a strong hand, with unusual weapons, or with menace of life or limb.

H. P. C. 138; Dalt. 300; Hawk. P. C. c. 64, § 25. β When the entry is both peaceable and lawful, neither at common law nor by statute can an indictment for a forcible entry be maintained. *Stale v. Johnson*, 1 Dev. & Bat. 324. But a bare entry on the possession of another, with or without title, without his consent, is, in contemplation of law, a forcible entry. *Brumfield v. Reynolds*, 4 Bibb, 389; *Henry v. Clark*, 4 Bibb, 426; *Chiles v. Stephens*, 3 Marsh. 347. In Pennsylvania, when no other force is used than is implied in every action of trespass, the case is not within the statutes. *Pennsylvania v. Dixon*, 1 Smith's Laws, 3; *Pennsylvania v. Robinsons*, Addis. 14.g

If a man enters peaceably into a house, but turns the party out of possession by force, or by threats frights him out of possession, this is a forcible entry.

Dalt. 299. But threatening to spoil his goods, or destroy his cattle, if he will not quit his possession, will not make a forcible entry. Bro. tit. *Duress*, 12, 16; 2 Inst. 257.

If a house be bolted, it is forcible to break it open, but it is not so to (a) draw a latch and enter into the house; and if a man, whose entry is lawful, shall notice the other out of the house and enter, the door being open or only latched, his entry is justifiable.

2. Ro. Rep. 2; 2 Inst. 235; Crom. 70 a. (a) Noy, 136, 137, *cont.*, who says, that there can be no entering if the door be latched; vide 1 Hawk. P. C. c. 64, § 26, *cont.*, who says, that such an inconsiderable circumstance as this, which commonly passes between neighbour and neighbour, will never bring a man within the meaning of these statutes; and it hath been holden, that an entry into a house through a window, or by opening a door with a key, is not forcible. Lamb. 143; 2 Ro. Rep. 2. || It was not so holden, in the note in Rolle's Reports, nor was it the point on which the judgment of the court was required. It was an opinion merely thrown out, *semble per eum*.||

If one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take peaceable possession thereof in the party's absence, this, by some opinions, says Hawkins, is no forcible entry, inasmuch as he did no violence to the house, but only to the person of the other. But he himself is of a contrary opinion, for though the force be not actually done upon the land, nor in the very act of entry, yet since it is used with an immediate intent to make such entry, and the manner of doing it only prevents the opposition, it cannot be said to be without force, which, whether it be upon or off the land, seems equally within the statute.

1 Hawk. P. C. c. 64, § 26. β A warrant may charge a forcible entry or a detainer in the alternative. *Carpenter v. Shepherd*, 4 Bibb, 501. And on a warrant for forcible

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(B) What shall be a forcible Entry and Detainer.

entry, if the jury find the defendant guilty of the *forcible entry* complained of, without finding that the premises were *detained*, it is sufficient. *Brumfield v. Reynolds*, 4 Bibb, 388. See *Swartzwelder v. U. S. Bank*, 1 J. J. Marsh. 44; *Cumac v. Macey*, 3 Marsh. 297; *Sinclair v. Saunders*, 3 J. J. Marsh. 303. A forcible entry and a forcible detainer are distinct offences, and a defendant may be acquitted of one and convicted of the other. *People v. Rickert*, 8 Cowen, 226; *People v. Godfrey*, 1 Hall, 240; *People v. Anthony*, 4 Johns. 198.*g*

If a man enters to distrain for rent in arrear with force, this is a forcible entry; because though he doth not claim the land itself, yet he claims a right and title out of it, which by these statutes he is forbid to exert by force. But if a man hath right to lands, and rides over them with company armed to church or market, without expressing any intent to claim them, this is no forcible entry, because his actions shall be interpreted according to his intent. But, if a man that has a rent be resisted from his distress by force, this is a forcible disseisin of the rent, for which he may recover treble damages in an assize, or may fine and imprison the party: but he cannot have a writ of restitution: for though the statute gives a remedy by fine and imprisonment for the unjust force that is offered to any person's right, yet it doth not give the justices power to reseize the rent, but only the lands and tenements themselves; and therefore no writ of restitution can be awarded.

Bridg. 175; 20 H. 6, 11 a; *Crom. Just.* 62; *Dalt.* 300.

A man may be guilty of a forcible entry in a dwelling-house, though there be nobody in the house at the time; and so he may by an entry into lands where any person's wife, children, or servants are upon the lands to preserve the possession; because whatsoever a man does by his agents is his own act; but his cattle being upon the ground do not preserve his possession, because they are not capable of being substituted as agents; and therefore their being upon the land constitutes no possession.

2 Ro. Rep. 2; *Perk.* 45; *Crom. Just.* 164; *Dalt.* 315; *Moore*, 656.

If several come in company where their entry is not lawful, and all of them, saving one, enter in a peaceable manner, and that one only use force, it is a forcible entry in them all, because they come in company to do an unlawful act; and, therefore, the act of the one is the act of them all, and he is presumed to be only the instrument of the rest. But otherwise it is, where one had a right of entry, for there they only come to do a lawful act, and therefore it is the force of him only that used it.

*Dalt.* 303; 9 Co. 67, 112, 115; *Fitz. tit. Coron.* 314, 315; *Co. Lit.* 157.

If divers enter by force to the use of A, and A afterwards agrees to it, this makes it a disseisin in A, but not a forcible entry within the statute, because the statute does not punish an agreement, but only the force and violence of an actual entry.

2 H. 7, 16 b; 20 H. 6, 11 a; *Cromp. Just.* 62 a; *Dalt.* 300.

If he, who hath an estate in land by a defeasible title, continues with force in the possession thereof, after a claim made by one, who had a right of entry thereto, he shall be adjudged to have entered forcibly.

*Hawk. P. C. c.* 64, § 34.

The same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also. Hence it follows, that whoever keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter. And it hath been said, that he also shall come under the like

(C) Of the Nature of Possessions.

construction, who places men at a distance from the house, in order to assault any one who shall make an attempt to enter into it; and that he also is in like manner guilty who shuts his door against a justice of peace coming to view the force, and obstinately refuses to let him come in. But it is said, that a man ought not to be adjudged guilty of this offence for barely refusing to go out of a house, and continuing therein in despite of another.

Cro. Ja. 199; Crom. 70; Lamb. 145; Hawk. P. C. c. 64, § 30.  $\beta$  One who keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily harm to the former possessor if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter. The People v. Rickert, 8 Cowen, 226.g

If a man holds the possession by force, though his entry was peaceable, the justices may remove him, if he had no right to enter; but, where the entry is at first peaceable and lawful, there, whether the justices may remove a forcible detainer, where it hath not been peaceably holden for three years, is a question; for that the justices are not judges of the right, but of the possession only; and if a man be gotten peaceably into his own, it seems he may defend it by force; and where the jury have found *quoad* the entry *ignoramus*, and *quoad* the detainer *billa vera*, such indictment hath been quashed, and the restitution granted upon it set aside, and a re-restitution awarded.

Dalt. 291; Yelv. 99, 100; Cro. Ja. 151; Sid. 97, 414; H. P. C. 149, *quod vide*, and Hawk. P. C. c. 64, § 32.

If two are in possession of a house, and the one enters by one title, and the other by another, he that hath right shall be supposed to be in the possession; but the justices have nothing to do to intermeddle, because there is no appearance of any force in either; and therefore either party that thinks himself injured must apply himself to an action at law to be redressed.

Dalt. 315.

(C) Of the Nature of the Possessions with respect to which one may be guilty of a forcible Entry and Detainer.

ONE may be guilty of this offence by a force done to ecclesiastical possessions, as churches, vicarage houses, &c., as much as if the same were done to any temporal inheritance.

Sid. 101; Lev. 99; Keb. 438; Cro. Ja. 41.

Also, an indictment of forcible detainer lies against one, whether he be tertenant or stranger, who shall forcibly disturb any in the enjoyment of an incorporeal inheritance, as rent, tithes, (a) common, or an office.

Cro. Car. 201, 486, but the justices cannot award restitution for these, because no man can be put out of possession of them but at his own election.  $\parallel$  In the anonymous case in Cr. Car. 201, restitution was awarded of tithes. As to rent, vide 32 H. 6, 2 a; F. N. B. 249.  $\parallel$  (a) *Quære*, Whether such indictment will lie for a common or office, and vide Hawk. P. C. c. 64, § 31, who says, that he can find no good authority that such indictment will lie; and note, that a man cannot be convicted upon view, by force of the 15 R. 2, c. 2, of a forcible detainer of any incorporeal inheritance, because he cannot be said to have made a precedent forcible entry.

No one can come within the danger of these statutes, by a violence offered to another, in respect of a way, or such like easement, which is no possession.

R. v. Holmes, Mod. 73; 2 Keb. 709, S. C. *Note*, It is said to be a general rule, that one may be indicted for entering into any inheritance, for which a writ of entry will lie. Hawk. P. C. c. 64, § 31; Cro. Car. 201; 20 H. 6, 11 a; 22 H. 6, 23 a.

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β Any act done by the owner of land, after his tenant has left it, indicating an intention not to abandon, but to hold possession to him, will continue the possession in him.

Brumfield v. Reynolds, 4 Bibb, 389.

Peaceable possession before the defendant's entry is sufficient to support an indictment for forcible entry and detainer; the title does not come in question.

The People v. Leonard, 11 Johns. 504; The People v. Van Nostrand, 9 Wend. 51; The People v. Nelson, 13 Johns. 340; The People v. Rickert, 8 Cowen, 226.

But the possession of the prosecutor must be quiet, peaceable, and actual, not a mere scrambling possession.

Ex parte Shotwell et al., Ashm. 140.*g*

(D) What Persons may be guilty thereof.

A MAN who breaks open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within the statutes.<sup>(b)</sup>

Lady Russell's case, Cro. Ja. 18; Moore, 786, S. C.; 2 Keb. 495, but Serjeant Hawkins makes a *quære*, whether a man's entering forcibly into the land in the possession of his own lessee at will, be within these statutes. Hawk. P. C. c. 64, § 32. || <sup>(b)</sup> The possession in law is in the owner of the house in this case, for the possession of the person claiming the custody is his possession.||

A jointenant or tenant in common may offend against the purport of these statutes, either by forcibly ejecting or forcibly holding out his companion; for though the entry of such a tenant be lawful *per my et per tout*, so that he cannot in any case be punished in an action of trespass at the common law; yet the lawfulness of his entry no way excuses the violence, or lessens the injury done to his companion, and, consequently, an indictment of forcible entry into a moiety of a manor, &c., is good.

Latch. 224; Palm. 419; Hawk. P. C. c. 64, § 33; Dalt. 315, 316; Ca. temp. Hardw. 174. β See Jones v. Overton, 4 Bibb, 334.*g*

A man cannot be indicted for entering into the king's possession by force, for that he cannot be disseised.

Co. 69; 10 Co. 112.

An infant at the age of eighteen, and some say fourteen, or a feme covert, by their own acts, may be guilty of a forcible entry, and they may be fined for the same. But it is doubted, whether the infant may be imprisoned, because his infancy is an excuse by reason of his indiscretion; and he shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named. But it is clearly agreed, that the command of an infant or feme covert to enter is void, and therefore only the person entering is punishable.

Bridg. 173; Crompt. Just. 62; Dalt. 300.

β An indictment will lie upon a forcible entry against a third person who intrudes himself on land, and enters after a judgment against a former intruder.

State v. Gilbert, 2 Bay, 355.*g*

(E) What ought to be the Form of a Record grounded upon these Statutes.

THESE statutes seem to require, that in the indictment the entry must be laid *manu forti*, or *cum multitudine gentium*, and that without these words

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the statute is not pursued. But some have holden that equivalent words will be sufficient, especially, if the indictment concludes *contra formam statuti*, and that these words in the statute are put in *ex abundanti cautela*. But it is not sufficient to say only, he entered *vi et armis*, since that is the common allegation in every trespass.

Style, 135; 2 Bulst. 258; 2 Ro. Abr. 80; Cro. Eliz. 461; Warner v. Collins, Noy, 155; Vent. 265; 2 Keb. 133; R. v. Wilson, 8 T. R. 357. {In an indictment at common law for a forcible entry into the mill, lands, and houses of the prosecutor, it is sufficient to lay the offence to have been done *unlawfully and with a strong hand*. 8 Term, 357, The King v. Wilson.}

It is sufficient in the caption of such an indictment to say, that it was taken before A B and C D *justiciariis ad pacem domini regis conservandam assignatis*, without showing, that they had authority to hear and determine felons and trespasses; for the statute enables all justices of the peace, as such, to take such indictments.

Ellis's case, Palm. 277; Cro. Ja. 633, S. C.

An indictment of forcible entry into a (a) tenement, (which may signify any thing whatsoever (b) wherein a man may have an estate of freehold,) or into a house (c) or tenement, or into two closes of meadow or (d) pasture, or into a rood (e) or half a rood of land, or into (g) certain lands belonging to such a house, or into such a house, without showing in what (h) town it lies, or into a (i) tenement with the appurtenances called Truepenny in D, is not good, for the place must be described with convenient certainty, for otherwise the defendant will neither know the special charge to which he is to make his defence, nor will the justices or sheriff know how to restore the injured party to his possession.

(a) Dal. 15; 2 Ro. Rep. 46; 2 Ro. Abr. 80, pl. 8; 3 Leon. 102. (b) Co. Lit. 6 a. (c) 2 Ro. Abr. 80, pl. 4, 5; Ro. Rep. 334; Cro. Ja. 633; Palm. 277. (d) 2 Ro. Abr. 81, pl. 4. (e) Bulst. 201. (g) 2 Leon. 186; 3 Leon. 101; Bro. tit. For. Ent. 23. (h) 2 Leon. 186. (i) 2 Ro. Abr. 80, pl. 7.

But it hath been resolved, that an indictment for forcible entry *in domum mansionalem sive messuagium*, &c., is good, for these are words equipollent.

Cro. Ja. 633; Palm. 277. An indictment for an entry into a close, called Serjeant Hern's Close, &c., without adding the number of acres, is good, for here is as much certainty as is required in ejectment. Cro. Eliz. 458; 2 Ro. Abr. 80, pl. 8.

Also, such indictment may be void as to such part thereof only as is uncertain, and good for so much as is certain; therefore an indictment for a forcible entry into a house and certain acres of land thereto belonging may be quashed as to the land, and stand good as to the house.

2 Leon. 186; 3 Leon. 102; Hawk. P. C. c. 64, § 37.

|| If there be two counts in an indictment, one upon the statute, and the other at common law, and the former be bad, and the other be good, the indictment may be supported. R. v. Bathurst, Say. Rep. 225.||

An indictment on the 5 R. 2, c. 8, or 15 R. 2, c. 2, needs not show who had the freehold at the time of the force, because these statutes equally punish all force of this kind, without any way regarding what estate the party had on whom it was made: yet it seems that such indictment ought to show, that such entry was made on the possession of some person who had some estate in the tenements, either as of freehold or as lessee for years, &c., for otherwise it doth not appear that such entry was made injuriously to any one.

2 Keb. 495; 3 Bulst. 71; Vent. 23.

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But it is said, that an indictment on 8 H. 6, c. 9, must show, that the place was the freehold of the party grieved at the time of the force, and therefore that it is not sufficient to say, that the defendant entered into such a house *existens liberam tenementum* J S without saying *adtunc existens liberum tenementum* J S, for otherwise it may be intended, that it was his freehold at the time of the indictment only.

2 Keb. 495; Salk. 260; Hetley, 73; Latch. 109.

It is therefore a general rule, that an indictment cannot warrant a restitution, unless it find that the party was seised at the time; but yet such seisin (a) is sufficiently shown by a necessary implication.

(a) As, where it is said, that the defendant disseised J S, which could not be unless J S had been seised, {4 Dall. 212, Commonwealth v. Fitch.;} and it hath been holden, that the words *possessionatus pro termino vite*, though not strictly proper in such indictment, are sufficient; neither is it necessary to show in particular what estate the party had. Palm. 426; Sid. 102; Yelv. 28; Cro. Ja. 633; Bulst. 177; Vent. 306.

An indictment on the 8 H. 6, c. 9, for entering and forcibly expelling my farmer, and disseising me, is good, without showing what estate he had; for the forcible disseisin to me being the main point of the indictment, it is sufficient to set it forth in substance.

2 Ro. Abr. 80, pl. 3, adjudged; but in this case the want of showing that the farmer was ousted, would have been an incurable fault. Yelv. 165.

Also, an indictment on 21 Ja. 1, c. 15, must show, that the party injured was possessed of such an estate as will bring him within that statute; and therefore it is not sufficient for it to show in general, that he was possessed, or that he was possessed of a certain term, without adding, for years; for in the first case it may be intended, that he was tenant at will, and in the second, that he was possessed for term of life; in neither of which cases is he within the statute: but it is said to be sufficient, to set forth a possession within the statute in the reciting part of an indictment, as thus, *quod cum* J S was possessed for a certain term of years, &c.

Vent. 306; Sid. 102; Mod. 73; 2 Keb. 709; Salk. 260, pl. 1; Ld. Raym. 610. *β* An indictment for forcibly entry and detainer under this statute must specify the kind of term from which the party is expelled to authorize a writ of restitution, and the term must be unexpired at the time of the trial. *State v. Butler*, Conf. Rep. 331; S. C. Tayl. 262.*g*

[In a late case in which the court of K. B. quashed an indictment, because it did not appear, what estate the person expelled had in the premises; they said, that it was absolutely necessary that this should appear, otherwise it will be uncertain whether any one of the statutes relative to forcible entries does extend to the estate from which the expulsion was. The 5 R. 2, c. 7, the 15 R. 2, c. 2, and the 8 H. 6, c. 9, extended only to freehold estates; and the 21 Ja. 1, c. 15, extends only to estates holden by tenants for years, tenants by copy of court-roll, and tenants by elegit, statute-merchant, and statute staple.

*R. v. Wanhope*, Say. Rep. 142; *R. v. Bathurst*, Ibid. 225.] *β* In an inquisition of forcible detainer, the proceeding being of civil nature, the court will grant a new trial, if the verdict be contrary to the evidence. *Adams' Executors v. Robeson*, 1 Mur. 392.*g*

A repugnancy in setting forth the offence in an indictment on these statutes is an incurable fault; as, where it is alleged, that the defendants *pacifice intraverunt, et J S adtunc et ibidem vi et armis disseiserunt*; or that the party was possessed of a term for years, or of a copyhold estate, and that the defendants disseised him; or that the defendants disseised J S of land, then and yet being his freehold; for it implies that he always continued

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in possession; and if so, it is impossible he could be disseised at all. But some say, that this may be reconciled, by intending that he re-entered after the disseisin, and before the indictment. But it seems clear, that if the words *adhuc extra tenet* be added, such a repugnancy cannot be helped by any intendment, and that no restitution can be awarded on such indictment, whether these words be added, or not, because the party grieved appears by the indictment to have had the freehold at the time it was so found.

Poph. 205; Raym. 67; Keb. 423, 428, 435, 472; Alleyn, 50; Vent. 108; 2 Ro. Rep. 311; Show. 272; 2 Bulst. 121; Sid. 102.

A conviction on 15 R. 2, c. 2, of a forcible detainer on view, cannot be good, unless it show, that the defendant was also guilty of a forcible entry; for it seems plain from the express words of that statute, that the justices have no jurisdiction by it over a forcible detainer, where there has not been a forcible entry. But it seems, that such forcible entry is sufficiently set forth in the complaint recited in the conviction; and it seems a reasonable opinion, that an indictment on 8 H. 6, c. 9, setting forth an entry and forcible detainer is good, without showing whether the entry was forcible or peaceable, for the words of the statute are, *where any doth make forcible entry in lands, &c., or them hold forcibly*. But it must set forth an entry; for otherwise it appears not, but that the party hath been always in possession, in which case he may lawfully detain it by force.

2 Ro. Abr. 80, pl. 10; Pahn. 195, 196, 197; Cro. Ja. 19, 20; Cro. Eliz. 915; Salk. 353.

The time and place of the disseisin are sufficiently set forth in an indictment, alleging that the defendant *tali die intravit, &c., et ipsum A B manu forti disseisivit*, without adding the words *ad tunc et ibidem*; for the entry and disseisin being both of the same nature, and the one plainly tending to the other, it is a natural intendment that they both happened together.

Cro. Ja. 41; Hawk. P. C. c. 64, § 42.

It has been resolved, that a disseisin is sufficiently set forth, by alleging, that the defendant entered, &c., into such a tenement, and disseised the party, without adding either the words *illicite* or *expulit* or *inde*, for the word *disseisivit* implies as much.\*

Noy, 125; Cro. Ja. 32; Cro. Eliz. 186; Noy, 120, *cont.* \* If the conviction is in the præterperfect tense, *accessimus et vidimus*, instead of the present tense, it shall be quashed. Stra. 443.

β In Kentucky, a judgment in the following words, though informal, was holden to be a good judgment, namely: "Therefore it is considered by the court, that the traverser have the benefit of the writ of restitution; and that he recover of the traversor his costs herein expended," &c.

Wheatly v. Price, 3 J. J. Marsh. 168.g

(F) Of the awarding of Restitution, by whom, and in what Manner: And herein of the Nature of the Possessions, and to whom such Restitution is to be made.

THE same justice or justices, before whom an indictment of forcible entry or detainer shall be found, may award restitution; but no other justices, but those before whom the inquest was found, can award restitution, unless the indictment be removed by *certiorari* into the King's Bench, and they by the plenitude of their power can restore, because that is supposed to be implied by the statute; for that whenever an inferior jurisdiction is erected, the superior jurisdiction must have authority to put it in execution. So, if an indictment be found before the justices of the peace at the quarter sessions,

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they have authority to award a writ of restitution, because the statute having given power to the justices or justice to reseize, it may as well be done by them in court as out of it; but the justices of *oyer* and *terminer* or general jail-delivery, though they may inquire of forcible entries, and fine the parties, yet they cannot award a writ of restitution.

H. P. C. 140; Bridgm. 175; Kel. 204; 11 Co. 59, 65; Dallison, 25, pl. 8; 9 Co. 118; Dalton's Just. 314; Lamb. Just. 160, 161; Vent. 308; Keb. 88; Sid. 156. *β* When the grand jury at the assizes find the bill for a forcible entry, held that the judge has still a discretion as to awarding the writ of restitution. Reg. v. Harland, 2 Mood. & Ry. 141. *g* The justices or justice may execute the same in person, or may make their precept to the sheriff to do it. Dyer, 187; Hawk. P. C. 152.

The sheriff, if need be, may raise the *posse comitatûs* to assist him in the execution of the writ of restitution; therefore, if he return that he could not make restitution by reason of resistance, he shall be amerced.

Lamb. Just. 157; Hawk. P. C. c. 64, § 52.

Restitution ought only to be awarded for the possession of tenements visible and corporeal; for a man, who has a right to such as are invisible and incorporeal, as rents or commons, cannot be put out of possession of them, but only at his own election, by a fiction of law, to enable him to recover damages against the person that disturbs him in the enjoyment of them; and all the remedy that can be desired against a force in respect to such possessions, is to have the force removed, and those who are guilty of it punished; which may be done by 15 R. 2, c. 2.

Lamb. Just. 133; Co. Lit. 323; Hawk. P. C. c. 64, § 45. Vide *supra* (C).

Restitution shall only be awarded to him who is found by the indictment to have been put out of *actual* possession, and, consequently, it shall not be awarded to one who was only seised in law; as to an heir on whom a stranger abateth upon the death of the ancestor, before any actual entry made by such heir. And from the same ground it followeth, that it shall not be granted to an heir upon an indictment finding a forcible entry made upon his ancestor.\*

Lamb. 153, 154; Dal. c. 83; Cro. Ja. 199; Hawk. P. C. c. 64, § 46. \*If the indictment is removed by *certiorari*, B. R. may award a restitution, discretional; and will do it, unless defendant plead very soon, and take notice of trial within term. R. v. Marrow, Ca. temp. Hardw. 174. *β* When restitution has been improperly awarded, or the proceedings below were irregular, the Supreme Court will, of course, award restitution. The People v. Shaw, 1 Caines, R. 125; In the matter of Shotwell, 10 Johns. 304. *g*

|| In all cases which admit of restitution, the prosecutor has a direct interest in the verdict, and, therefore, is not a competent witness.

Rex v. Beavan, Ry. & Moo. Ca. 242; Rex v. Williams, 9 Barn. & C. 549.

*β* After judgment against A in an indictment for forcible entry, under the writ of restitution, the sheriff may turn out B, whom A has put in possession.

State v. Gilbert, 2 Bay, 355.

When the defendant, against whom a bill of indictment for forcible entry has been found, traverses the force, a writ of restitution will not be granted until the question of force has been tried.

State v. Dayley, 2 Nott & M'C. 121. *g*

(G) What shall be a Bar or Stay to such Award of Restitution: And herein of superseding and setting it aside after it is executed.

It appears by the proviso in the statute of 8 H. 6, c. 9, and also by the 31 Eliz. c. 11, that any one indicted upon these statutes may allege quiet



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possession for three whole years to stay the award of restitution; in the construction whereof, saith Serjeant Hawkins, it hath been holden, that such possession must have continued, without interruption, during three whole years next before the indictment; and therefore that he who, having been in possession of land for three years or more, is forcibly ousted, and then restored by force of the statute of 8 H. 6, c. 9, cannot justify a forcible detainer till he hath been in possession again for three years after such restitution. And also for the same reason it hath been said, that he who, under a defeasible title, hath been never so long in possession of land to which another hath a right of entry, cannot justify such a detainer at any time within three years after a claim made by him who hath such right, and the subsequent continuance in possession amounted to a new entry.

Hawk. P. C. c. 64, § 53, and the authorities cited are Dal. c. 79; Crom. 71; H. P. C. 139; Dyer, 141, pl. 48; 22 H. 6, 18; Bro. tit. *Force*, 22, 29; Inst. 256.

Also, it is said, that the three years' possession must be of a lawful estate, and therefore that a disseisor can in no case justify a forcible entry or detainer against the disseisee having a right of entry, as it seems that he may against a stranger, or even against the disseisee, having by his laches lost his right of entry.

Dalt. c. 79; 22 H. 6, 18 b; Crom. 71. For by Hawkins, such disseisor may justify against a stranger, or even against the disseisee, if his right of entry is taken away. Hawk. P. C. c. 64, § 54.

Wherever such possession is pleaded in bar of a restitution, either in the King's Bench, or before justices of the peace, no restitution ought to be awarded till the truth of the plea be tried; and such plea need not show under what title, or of what estate such possession was, because not the title, but the possession only is material.

Keb. 538; Salk. 261; Hawk. P. C. c. 64, § 56; Sid. 149; Keb. 538; Raym. 84; Vent. 265.

If one, who has been three years in possession, be afterwards ousted, and the same day re-enter with force, and be also indicted on the same day; yet it seems that, by the plain meaning and reason of the statute, he can no more bar the restitution of the party forcibly entered upon, than if he had been indicted on another day, though the words of the statute are, *that there shall be no restitution, &c., if the person indicted have been in quiet possession for three years next before the day of the indictment found*; for the import hereof seems to be no more than if it had been said, *for three years next before the indictment*.

Hawk. P. C. c. 64, § 57.

The justices must not award restitution in the defendant's absence, and without calling him to answer for himself; for it is implied by natural justice, in the construction of all laws, that no one ought to suffer any prejudice, without having an opportunity to defend himself.

Al. 78, 79; Hawk. P. C. 64, § 60; Savil, 68, pl. 141.

If the defendant tender a traverse of the force, (which must be in writing,) no restitution ought to be till such traverse be tried, in order to which the justice, before whom the indictment is found, ought to award a *venire* for a jury. But, if such jury find so much of the indictment to be true as will warrant a restitution, it will be sufficient, though they find the other part of it to be false.

Keb. 343, 427; 2 Keb. 49, 571; Sid. 97, 99, 284; 2 Salk. 587, pl. 3, 588.

The same justices, who have awarded a restitution on an indictment of

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forcible entry, &c., or any two or one of them, may afterwards supersede such restitution upon an insufficiency in the indictment appearing unto them; but no other justices or court whatsoever have such power, except the Court of King's Bench. But a *certiorari* from thence wholly closes the hands of the justices of peace, and avoids any restitution which is executed after its *teste*, but does not bring the justices into a contempt without notice.

Dyer, 187, pl. 6; H. P. C. 140; Crom. 165; Dalt. c. 81, 84; Cro. Eliz. 915; Yelv. 32; Mo. 677, pl. 921; Keb. 93.

Also, the Court of King's Bench has such a discretionary power over these matters, from an equitable construction of the statutes, that if a restitution shall appear to have been illegally awarded or executed, the said court may set it aside, and grant a re-restitution to the defendant; as, where the indictment on which the justices proceeded is quashed for insufficiency; or where it appears that the justices of peace were irregular in their proceedings, as by refusing to try a traverse of force, &c.; or where the defendant traverses the force and gets a verdict in the King's Bench; but the defendant cannot get such verdict if the force be pardoned by a general statute-pardon before the trial, because the offence appearing to the court to be discharged, it can no longer be proceeded upon, though the defendant would waive the benefit of the pardon.

Savil, 68, pl. 141; H. P. C. 140; Cro. Eliz. 31; Noy, 119; Yelv. 99; Cro. Ja. 148; Ca. temp. Hardw. 176.

Neither can a defendant in any case whatsoever *ex rigore juris* demand a restitution, either upon the quashing of the indictment, or a verdict found for him on a traverse thereof, &c., for the power of granting a restitution is vested in the King's Bench only by an equitable construction of the general words of the statutes, and is not expressly given by those statutes, and is never made use of by that court, but when, upon consideration of the whole circumstances of the case, the defendant shall appear to have some right to the tenements, the possession whereof he lost by the restitution granted to the prosecutor.

Raym. 85; Keb. 343, 808; 2 Keb. 505; H. P. C. 141; Cro. Eliz. 916; 2 Salk. 587, pl. 3; Dyer, 123, pl. 34; 2 Keb. 571; Savil, 68, pl. 151. || But see *R. v. Jones*, 1 Str. 474, where, upon the quashing of a conviction of forcible entry, restitution was opposed, on an affidavit, that the party's title (which was by lease) was expired since the conviction; but the court said, they had no discretionary power in the case, but were bound to award restitution on quashing the conviction.||

The court of B. R. hath been so favourable to one, who, upon his traverse of an indictment upon these statutes being found for him, hath appeared to have been unjustly put out of his possession, that they have awarded him a re-restitution, notwithstanding it hath been shown to the court, that since the restitution granted upon the indictment, a stranger hath recovered the possession of the same land in the lord's court.

Cro. Eliz. 41; Hawk. P. C. c. 64, § 66.

¶ A writ of restitution will not be allowed when it appears that the lease, under which the party claims, has expired.

*State v. Butler*, C. & N. 331.*g*

## FORESTALLING.

- (A) What it is at Common Law, and how punished.  
 (B) What it is by Statute, and how restrained and punished.

—◆—

(A) What it is at Common Law, and how punished.

ALL unlawful endeavours to enhance the price of any commodity, practices so prejudicial to trade and commerce, and injurious to the public in general, come under the notion of forestalling, which includes engrossing, regrating, and all other offences of the like nature. It is punishable by fine and imprisonment, answerable to the heinousness of the offence, upon an indictment at common law.

3 Inst. 105 ; 43 Ass. 38 ; Bro. *Indictment*, 40.

Offences of this kind are those of spreading false rumours, buying things in a market before the accustomed hour, or buying and selling again the same thing in the same market, and other such like devices.

Crom. 80 ; Hawk. P. C. c. 80, § 1.

|| So, spreading rumours with intent to enhance the price of hops in the presence and hearing of hop-planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c., that so they might be induced not to bring their hops to market for sale for a long time, and the price might be thereby greatly enhanced.

R. v. Waddington, 1 East, 143.

So, spreading such rumours generally with intent to enhance the price of hops.

R. v. Waddington, 1 East, 143. || \*

Also, if a person (*a*) within the realm buys any merchandise in gross, and sells the same again in gross, it is an offence of this nature, for hereby the price is enhanced, because, passing through several hands, each will endeavour to make his profit of it.

3 Inst. 196 ; Hale's P. C. 152. (*a*) But any merchant, whether he be a subject or a foreigner, bringing victuals, or any other merchandise, into the realm, may sell the same in gross. 3 Inst. 196 ; Hale's P. C. 152.

So, the bare engrossing of a whole commodity with an intent to sell it at an unreasonable price, is an offence indictable at the common law ; for if such practices were allowed, a rich man might engross into his hands a whole commodity, and then sell it at what price he should think fit.

Cro. Car. 231 ; Hawk. P. C. c. 80, § 3 ; {1 East, 143, *The King v. Waddington* ; Ibid. 167, *The same v. the same*.}

Also, even the buying of corn in the sheaf is an offence at common law, because it tends to enhance, which shows how jealous the law is of all practices of this kind.

3 Inst. 197 ; Hale's P. C. 152.

|| So, the buying of hops growing by forehand bargains, with intent to

(B) What it is by Statute, and how restrained, &c.

re-sell at an exorbitant profit, and thereby enhance the price, is an offence at common law.

R. v. Waddington, 1 East, 168.

The forestalling of any commodity, which is become a common victual and necessary of life, or used as an ingredient in the making or preservation of any victual, though not formerly used or considered as such, is an offence at common law.

R. v. Waddington, 1 East, 169.||

(B) What it is by Statute, and how restrained and punished.

THE statutes relating hereunto are 23 E. 3, c. 6; 6 Rich. 2, c. 10; 11 Rich. 2, c. 7; 1 H. 4, c. 17; 14 H. 6, c. 6; 25 H. 8, c. 2; 2 & 3 E. 6, c. 15; 3 & 4 E. 6, c. 21; 5 & 6 E. 6, c. 14; 5 Eliz. c. 5 and 12; 13 Eliz. c. 25; 21 Ja. 1, c. 22, and 2 & 3 P. & M. c. 13; 31 Geo. 2, c. 40.

But the principal statute was (for it is now repealed by 12 Geo. 3, c. 71,) the 5 & 6 E. 6, c. 14, by which it is enacted, "that whosoever shall buy, or cause to be bought, any merchandise, victual, or any other thing whatsoever (a) coming by land or by water toward any market or fair to be sold in the same, or coming toward any city, port, haven, creek, or road of this realm, or Wales, from any parts beyond the sea to be sold, or make any bargain, contract, or promise, for the having or buying of the same, or any part thereof so coming as aforesaid, before the same shall be in the market, fair, city, or port, &c., ready to be sold, or shall make any motion by word, letter, message, or otherwise, to any person or persons, for the enhancing of the price or dearer selling of any thing above mentioned, or else dissuade, move, or stir any one coming to the market, or fair, to abstain or forbear to bring or convey any of the things above rehearsed, to any market, fair, city, or port, &c., to be sold, shall be deemed a forestaller."

(a) On this clause it hath been adjudged, that an indictment, charging the defendant with meeting J S at such a place near B, and there buying of him certain goods, which he was about to sell in the market of B, is insufficient, without alleging expressly, that the goods were coming to the market to be sold. Ro. Rep. 421.

And by the said statute, § 2, it is enacted, "that whosoever shall by any means regrate, obtain, or get in his hands or possession, in any fair or market, any (b) corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead (c) victual whatever that shall be brought to any fair or market to be sold, and do sell the same again in any fair or market holden in the same place, or within four miles thereof, shall be taken for a regrator."

(b) That the buying of corn, with an intent to make starch of it, and then to sell it, is not within the statute, because it is not bought to be sold again in the same nature in which it was bought, but to be first altered by a trade or science, and then sold again. Bridg. 5, 6; Hawk. P. C. c. 80, § 18.—Nor for the same reason does the buying of corn in order to make meal of it seem to be within the statute. Moore, 595, pl. 810; Cro. Car. 231, *cont.* Owen, 135. Nor the buying of barley with an intent to make malt of it. Cro. Car. 231; 3 Inst. 196, *cont.* Owen, 135. But this last is excepted by an express proviso, § 7, in the statute.—But the buying of corn, and turning it into malt in another's house, being so large a quantity that it could not be malted in the buyer's own house, is not within the benefit of this exception. Owen, 135. (c) It hath been holden, that buying salt is a victual within this statute, as being necessary for the food and health of man, and seasoning and making wholesome other victuals. 3 Inst. 195; Hale's P. C. 152; Cro. Car. 231.—But neither apples, cherries, nor other such like fruits, are within the intent of the statute. 3 Inst. 195; Hale's P. C.

Forfeiture.

152; Cro. Car. 231; Owen, 135; Cro. Ja. 214.—Nor hops. Cro. Car. 231.—Nor malt. 3 Inst. 196; Hale's P. C. 152, *cont.* Owen, 135; Ro. Rep. 12.

And it is further enacted by the said statute, § 3, "that whosoever shall (*a*) engross or get into his hands, by buying, contracting, or promise of taking, other than by (*b*) demise, grant, or lease of land, or tithe of any corn, growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, to the intent to sell the same again, shall be reputed unlawful engrosser."

(*a*) That an indictment, which charges the defendant with having bought so much corn, &c., is insufficient, for the words are, *shall engross or get into his hands by buying*, &c., and therefore must be precisely pursued. 2 Leon. 39. (*b*) That there is no necessity in an information or indictment to say that the defendant did not come by it by a demise of land, &c.: but that the defendant, if he have any such matter to allege in his defence, may give it in evidence. Jon. 157.

And it is further enacted by the said statute, § 4, 5 and 6, "that whoever shall offend in any of the things before recited, and be thereof duly convicted, shall for the first offence suffer imprisonment for two months, and forfeit the value of the goods so by him bought or had; and for the second offence shall suffer imprisonment for one half year, and forfeit the (*c*) double value of the goods, &c., and for the third offence shall be set on the pillory, and forfeit all his goods, and be committed to prison during the king's pleasure."

(*c*) And therefore no information for engrossing corn, &c., contrary to the statute, is good, which doth not expressly show the quantity of the thing engrossed; and on this foundation it was adjudged, that an information for engrossing corn, the quantity whereof was expressed by the word *cumulus*, was insufficient. 2 Bulst. 317; Cro. Car. 381.—But it is said by Powell, J., that an indictment for engrossing *magnam quantitatem frumenti* is sufficient. 6 Mod. 32. || But this is too general. R. v. Gibbs, 1 Str. 497; R. v. Gilbert, 1 East, 583. ||—The stat. 12 Geo. 3, c. 71, repeals 3 & 4 Ed. 6; 5 & 6 Ed. 6; 3 Ph. & M.; 5 Eliz.; 15 C. 2, and part of 5 Ann. and all acts enforcing them.

FORFEITURE.

FORFEITURE is a word often made use of in the law, and in civil cases is usually applied to alienations and dispositions made by those who have but a particular estate or interest in lands or tenements, to the prejudice of those in remainder or reversion. Also, the omission or neglect of a duty which the party binds himself to perform, or to the performance of which he is enjoined by the law, is upon the breach or neglect thereof called a forfeiture, that is, the advantages accruing from the performance of the thing are by his omission defeated and determined.

Co. Lit. 59 a. *β* Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they become vested in the party injured, as a recompense for the wrong which he alone, or the public together with himself, hath sustained. 2 Bl. Com. 267. Lands, tenements and hereditaments may be forfeited by various means; 1. By the commission of crimes and misdemeanors; 2. By alienation contrary to law; 3. By the non-performance of conditions; 4. By waste. Bouv. L. D. h. t. g

In this sense of the word the principal matters relating to forfeiture are considered under the titles *Estates for Life, Copyhold, Conditions, Obligations*.  
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## (A) Of the Forfeiture of Lands at Common Law.

*gations*, and title *Offices*; and therefore in this place we shall consider it only as it relates to crimes and offences, for which the party is punished in his estate and posterity.\*

\* See this subject fully considered in "Considerations on the Law of Forfeiture for High Treason."—{and 3 Wils. Works, 37—44.}—In *high treason*, the forfeiture accrues to the crown (of whomsoever the land is holden) *propter delictum tenentis*, and this though the blood of the heir is saved, for the offence is purged by that; but in *felony*, saving the blood preserves the descent to the heir, because the lord is entitled by escheat *propter defectum sanguinis*. Foster, 223.

(A) For what Crimes an Offender shall forfeit his Lands at Common Law.

(B) For what Crimes his Goods and Chattels.

(C) For what Crimes by Statute.

(D) To what Time the Forfeiture shall have Relation.

(E) What is to be done with the Offender's Goods before Conviction.

(F) Where the Wife shall lose her Dower.

(G) How far the Blood of the Offender is corrupted.

β(H) Forfeitures under the laws of the United States.*g*

(A) For what Crimes an Offender shall forfeit his Lands at Common Law.

By the common law, all lands of inheritance whereof the offender is seized in his own right, and also all rights of entry to lands in the hands of a wrongdoer, are forfeited to the king on an attainder of high treason, although the lands are holden of another; for there is an exception in the oath of fealty, which saves the tenant's allegiance to the king; so that if he forfeits his allegiance, even the lands holden of another lord are forfeited to the king, for the lord himself cannot give out lands upon that condition.

Co. Lit. 8; 3 Inst. 19.

Also, upon an attainder of petit treason or felony, all lands of inheritance whereof the offender is seized in his own right, as also all rights of entry on lands in the hands of a wrongdoer, are forfeited to the lord of whom they are immediately holden. For this by the feudal law was deemed a breach of the tenant's oath of fealty in the highest manner, his body with which he had engaged to serve the lord being forfeited to the king, and thereby his blood corrupted, so that no person could represent him; and, consequently, dying without heir, the lord is in by escheat.

3 Inst. 19. β It is declared by the Constitution of the United States, art. 3, s. 3, "that no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the offender." The forfeiture of estate for crimes is very much reduced in practice in this country, and, when it occurs, the state takes the title the party had and no more. 4 Mason R. 174; Act of Congress of April 30, 1790, sect. 24, 1 Story, L. U. S. 88.*g*

But the lord cannot enter into the lands holden of him upon an escheat for petit treason or felony without a special grant, till it appear by due process, that the king hath had his prerogative of the year, day, and waste.

Stamf. P. C. 191; 2 Hawk. P. C. c. 49, § 3.

And as to this, since the statute of *prærogativa regis*, it seems to have been generally holden, that the king has a right, not only to waste the lands of inheritance, which a person attainted of felony held immediately of any other lord, but also to hold them over for a year and day; and by some he had always this right, but according to others he had anciently a right only to the waste, and the year and day was given him in lieu of it.

2 Inst. 36, 37; 4 Co. 124, and vide 2 Hawk. P. C. 49, § 8.

(A) Of the Forfeiture of Lands at Common Law.

As to lands whereof a person attainted of high treason (*a*) dies seised of an estate in fee, they are actually vested in the king without any office, because they cannot descend, the blood being corrupted, and the freehold shall not be in abeyance.

Co. Lit. 2; 4 Co. 58; Leon. 21. (*a*) But by the common law such lands were not vested in the actual possession of the king during the life of the offender. 3 Co. 10; Stampf. P. C. 191; Bro. Coron. 208, 210; Leon. 21; Co. Lit. 2.

It is said, that the inheritance of things not lying in tenure, as of rent-charge, rent-seek, commons, &c., are forfeited to the king by an attainder of high treason; and that the profits of them are also forfeited to him by an attainder of felony during the life of the offender, and that the inheritance shall be extinguished by his death; for it cannot escheat, because it lies not in tenure; neither can it descend, because the blood is corrupted.

3 Inst. 19, 21; 2 Hawk. P. C. c. 49, § 4.

It seems agreed, that no (*b*) right of action to lands of inheritance could ever be forfeited; neither could (*c*) a right of entry into lands whereof there was a tenant by title, nor an (*d*) use, except where land had been (*e*) fraudulently conveyed with an intent to avoid a forfeiture; nor could a (*g*) condition be forfeited before 33 H. 8, c. 20; neither could land in (*h*) tail be forfeited after the making of West. 2, 13 Ed. 1, c. 1, any longer than for the life of the tenant in tail, till 26 H. 8, c. 13.

(*b*) 3 Co. 2, 3; 7 Co. 17. (*c*) 3 Inst. 19. (*d*) 3 Inst. 19. {2 John. Rep. 248, 260, Jackson v. Catlin.} (*e*) 2 Ro. Abr. 34. (*g*) 3 Inst. 19. (*h*) 3 Inst. 19; Stampf. P. C. 187; Plow. 554; Dyer, 289, pl. 55; Co. Lit. 130, 372, 391. The case of Captain John Gordon, Fost. 95.

The profits of lands, whereof one attainted of felony is seised of an estate of inheritance in his wife's right, or of an estate for life only in his own right, are forfeited to the king, and nothing shall go to the lord.

3 Inst. 19; Fitz. Assize, 166; Forfeiture, 23; 4 Ass. pl. 4.

All customary estates of inheritance are forfeited by an attainder, of treason or felony, unless there be some particular custom to the contrary, as in gavelkind; because the person is *civiliter mortuus* by the attainder and therefore is disabled to have or hold any estate or to have any property in any thing. And therefore if a person be seised in fee of a copyhold, and be attainted of treason or felony, the copyhold is in the lord without any presentment of the homage, because it is against the nature of a court-baron to inquire of criminal matters or offences against the king; and such homage is at the will of the lord, and often influenced by him. But, if a copyholder be convicted of felony, and presented by the homage, by *special custom* the estate may be forfeited to the lord. But this is *only* by the *special custom*, since the copyholder is not disabled by the *conviction* to hold the estate, as he is, if he was *attainted*; and therefore since it is by the *custom only* that such forfeiture accrues, it must be in the manner which the custom has settled it, which is, by presentment of the homage. But, if a copyhold is granted for life, and by another copy the reversion is granted to another, *habend.* after the death of the first copyholder, or surrender, forfeiture or other determination of the first estate; the first copyholder commits murder, and is therefore attainted, the king pardons the murder and the attainder and all forfeitures thereby; in this case, he in the reversion is entitled to the estate: for the king cannot have it for the baseness of the tenure, since he cannot be tenant at will to any person; and the lord cannot have it, because he

## (B) Of the Forfeiture of Goods and Chattels.

cannot be tenant to himself; therefore the particular estate of tenant for life being extinguished, the reversion immediately commences.

Bulstr. 13; 2 Brownl. 217, &c.; Leon. 1; Godb. 267; 2 Jon. 189; Lev. 263; 2 Keb. 451, 466; 2 Vent. 38; 5 Co. 117; Co. Cop. § 58; Pollex. 615 to 621.

## (B) Of the Forfeiture of Goods and Chattels.

ALL things whatsoever, which come under the notion of a personal estate, and which a man is entitled to in his (a) own right, whether they be in action or possession, are forfeitable in the following instances to the (b) king, for the trouble and charge he has been at in holding courts and bringing the offender to justice.

Staundf. Prerog. 45, 46; 12 Co. 12. (a) But not those which he hath as executor or administrator to another. Cro. Car. 566.—Also, a term limited to executors, and not vested in the party himself, is not forfeitable. 2 Leon. 5, 6; And. 19; Moore, 100; Dyer, 309, 310. (b) That the lord of the manor, or other private person, may have *bona felonum et fugitivorum*, but they must be claimed by way of grant, and not by prescription, because no man can prescribe for them; for every prescription must be immemorial; and the goods of felons and fugitives cannot be forfeited without matter of record, which presupposes the memory of that continuance. 5 Co. 109; 46 E. 3, 16.

Also, personal things, settled by way of trust on the offender, are as much forfeited as if he had the legal interest, or were in possession of them; as, if a bond be taken in another's name, or a lease made to another in trust for a person who is afterwards convicted of treason or felony; these are as much liable to be forfeited as a bond made to him in his own name, or a lease in possession.

Cro. Ja. 312; Hob. 214.

Also, the trust of a term granted by a man for the use of himself, his wife and children, &c., is liable in like manner to be forfeited, if fraudulently made with an intent to avoid a subsequent forfeiture, but it shall be forfeited so far only as it is reserved to the benefit of the party himself, if made *bonâ fide*, whether before or after marriage, for good consideration without fraud, which is to be left to a jury on the whole circumstances of the case, and shall never be presumed by the court where it is not expressly found.

2 Keb. 564, 608, 644, 763, 772; Lev. 279; Lane, 54, 113; Mod. 16, 38; Hard. 466; And. 294; Raym. 120; 2 Ro. Abr. 34; Ro. Abr. 343; March, 45, 88; Sid. 260, 403; Keb. 909.

But the power of revocation of the trust of a settlement reserved to the grantor is not liable to be forfeited, if it depend upon something personal to be done by the grantor himself, as, making the deed of revocation under his hand and seal.

2 Keb. 564; Lev. 279; Mod. 16, 38; Vent. 128.

A man forfeits all such personal estate in the following instances:

1. Upon a conviction of treason or (c) felony, as is clearly agreed by all the books.

5 Co. 109. (c) And therefore a person convicted of manslaughter, and making purgation, as was the ancient practice, or burnt in the hand according to the present, forfeits his goods and chattels, but not his lands, for the king hath lost a subject; and therefore the party is punishable, though in a more gentle manner than when there is a sedate and deliberate revenge. 5 Co. 110.—That a person convicted of heresy forfeited neither lands nor goods because the proceedings against him were only *pro salute anime*. Doct. and Student, l. 2, c. 29; Hale's P. C. 5.

2. Upon the coroner's inquest taken on (d) view of a dead body, and finding him guilty either as principal or as accessory (e) before the fact, and



## (B) Of the Forfeiture of Goods and Chattels.

that he fled for the same, whereby he forfeits his goods absolutely and the issues of his lands, till he be acquitted or pardoned.

Staundf. P. C. 813; Hale's P. C. 271; Keilw. 68 b; Dyer, 239, pl. 36; 5 Co. 110. (d) And that in such cases where the coroner cannot have the view of the body, the king shall entitle himself to the goods and chattels upon a presentment. 5 Co. 109. (e) *Secus*, if he be found accessory after, for the indictment is so far void. Staundf. P. C. 184.

3. Upon a jury's finding that the defendant fled at the same time that they acquit him of an indictment of capital felony, or, as some say, of larceny, before justices of *oyer*, &c. But such a finding causes no forfeiture of the issues of the land, because by the acquittal the land is discharged; neither will it have any effect as to the goods, if the indictment were insufficient, or if the flight be disproved on a traverse, which, as all agree, may be taken to any such finding, except that by a coroner's inquest, and as (a) some say, even to that, as well in respect of the flight, as of the particulars of the goods.

Keilw. 68; 5 Co. 110; Hale's P. C. 271; Staundf. 184. (a) For this vide tit. *Coroner*.

4. The goods of persons outlawed are forfeited to the king; for the retiring from the inquiries of justice is holden so criminal in the eye of the law, that it is punished with the loss of goods so long as the outlawry stands in force. So, (b) if a person make default till the award of an *exigent*, either upon an appeal or indictment of a capital felony, he forfeits his goods, unless he was pardoned before the *exigent* was awarded. And it is (c) holden, that the law is the same as to such a default upon an indictment of petit larceny, and that wherever goods are so forfeited they are not saved by an acquittal at the trial. (d) But by a reversal of the award of the *exigent* they are saved, whether such reversal be for an error either in fact or in law, as for the imprisonment of the defendant at the time when the *exigent* was awarded, or for a defect in the indictment, appeal, or process.

5 Co. 110, 111, vide tit. *Outlawry*. (b) Fitz. Coron. 181; Forfeiture, 28; Staundf. P. C. 183, 184; Staundf. Prerog. 47; Bro. Coron. 8; Finch. 352; Ro. Abr. 793; 41 Ass. pl. 13; 22 Ass. pl. 11; Cro. Eliz. 4, 72. (c) Hale's P. C. 271. (d) 5 Co. 110, 111; 43 E. 3, 17; Hale's P. C. 271; Co. Lit. 259; Cro. Ja. 464; Staundf. Prerog. 47.

If a man be *felo de se*, or if a felon be killed in the robbery, or by resisting in order to escape, he forfeits his goods and chattels; for when a man thus forsakes life, all his goods and chattels are derelict; and therefore the king shall have them as the maintainer of public justice.

5 Co. 109; Fitz. Coron. 289, 312; Staundf. P. C. 184; 3 Inst. 56, 227; Plow. 260.

6. If a felon waives, that is, leaves any goods in his flight from those who either pursue him or are apprehended by him so to do, he forfeits them, whether they be his own goods, or goods stolen by him. And at common law, if the owner did not pursue and appeal the felon, he lost the goods for ever; but by the (e) 21 H. 8, c. 11, for encouraging the prosecution of felons, it is provided, that if the party come in as evidence on the indictment, and attaint the felon, he shall have a writ of restitution.

5 Co. 109; 3 Inst. 134; Cro. Eliz. 694. (e) But for this vide 2 Hawk. P. C. c. 23, § 53. And that a sale in a market overt does not so far alter the property of the goods, but that upon a prosecution by the person from whom they were stolen, he shall have them again. Tit. *Fairs and Markets*.

And here we may observe a difference between goods waived, strays and the like, and goods forfeited for felony or flight; for, as it has been observed,

(C) For what Crimes by Statute.

goods forfeited for felony are not in the king without an office found of such felony or flight, because the property cannot alter without matter of record ; but goods waived are in the king without office, because there the property is in nobody ; and therefore by public agreement they are put out of the finder, in whom they were by the state of nature, and are vested in the king as a recompense for his trouble and charge in the execution of justice.

5 Co. 109, Foxley's case.

(C) For what Crimes by Statute.

By the 26 H. 8, c. 13, § 4, it is enacted, "That every offender and offenders, being hereafter lawfully convict of any manner of high treasons by presentment, confession, verdict or process of outlawry, according to the due course and custom of the common laws of this realm, shall lose and forfeit to the king's highness, his heirs and successors, all such lands, tenements and hereditaments, which any such offender or offenders shall have of any estate of inheritance, in use or possession, by any right, title, or means, within the realm of England, or elsewhere within any of the king's dominions, at the time of any such treason committed, or at any time after ; saving to every person and persons, their heirs and successors, other than the offenders in any treasons, their heirs and successors, and such person and persons as claim to any their uses, all such rights, titles, interests, possessions, leases, rents, offices, and other profits, which they shall have at the day of committing such treasons, or at any time afore, in as large and ample manner as if this act had never been had nor made."

|| So, to the same effect, the statute of 5 & 6 E. 6, c. 11, § 9, (which is not repealed by st. 1, Mar. Sess. 1, c. 1.)||

|| This statute, extending only to lands, &c., which the person attainted had in possession or use, but not to rights, conditions, &c., nor to parliamentary attainders, or where the party stood mute ; || it is, by the 33 H. 8, c. 20, § 3, enacted, "That if any person or persons shall be attainted of high treason, by the course of the common law or statutes of this realm, in every such case every such attainer by the common law shall be of as good strength, value, force, and effect, as if it had been done by authority of parliament ; and that the king's majesty, his heirs and successors, shall have as much benefit and advantage by such attainer, as well of uses, rights, entries, conditions, as possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of parliament ; and shall be deemed and adjudged in actual and real possession of the lands, tenements, hereditaments, uses, goods, chattels, and all other things of the offenders so attainted, which his highness ought lawfully to have, and which they, so being attainted, ought or might lawfully lose and forfeit, if the attainer had been done by authority of parliament, without any office or inquisition to be found of the same ; any law, statute, or use of the realm to the contrary thereof in anywise notwithstanding.

Downtie's case, 3 Co. 10 b.

§ 4. "Saving to all and every person and persons, and bodies politic, and their heirs, assigns, and successors, and every of them, (other than such person and persons which hereafter shall be attainted of high treason, and their heirs and assigns, and every of them, and all and every other person and persons claiming by them or any of them, or to their uses, or to

(C) For what Crimes by Statute.

the uses of any of them, after the said treasons committed,) all such right, title, use, possession, entry, reversions, remainders, interests, conditions, fees, offices, rents, annuities, commons, leases, and all other commodities, profits and hereditaments whatsoever they or any of them should, might, or ought to have had, if this act had never been made."

|| By st. 7 Ann. c. 21, § 10, after the decease of the Pretender, no attainer for high treason was to prejudice the right and title of any person, other than the right of the offender during his life. By 17 G. 2, c. 39, § 3, the operation of this clause in the statute of Ann. was postponed till the death of the Pretender's sons. By 39 G. 3, c. 93, the act of Ann. was wholly repealed.||

In the construction of these statutes the following opinions have been holden:

1. That neither of these statutes is repealed by 1 Ma. Sess. 1, c. 1, which enacts, "That no pains of death, penalty, or forfeiture, shall ensue to any offender, for the doing any treason, petit treason, misprision of treason, other than such as be within the statute of 25 E. 3, st. 5, c. 2, ordained and provided;" for the words, *other than such*, &c., have been construed not to extend to the pains, &c., mentioned in the beginning of the sentence, but to the offences mentioned in the end of it.

Standf. P. C. 387; 3 Inst. 19; Dyer, 28; 2 Hawk. P. C. 452; 1 H. H. P. C. 241, 356.

2. That estates in tail are forfeited by force of these words in 26 H. 8, c. 13, *of any estate of inheritance*, which must be void, if they do not include estates in tail. (a) Also, lands given to a man and his wife and the heirs of their two bodies, are as much forfeited by his attainer, as lands given to him and the heirs of his body.\*

Standf. P. C. 187; Co. Lit. 372 b. (a) Dyer, 322, pl. 27, adjudged. \* If A entails his estate in Scotland on himself for life, remainder to B his eldest son, and the heirs male of his body, remainder to the heirs male of A's own body, with subsequent limitations, and the reversion to the heirs and assigns whatsoever of A with prohibitive, irritant, and resolute clauses; and A dies, leaving B, and another son, C; B is attainted of high treason; the estate is forfeited to the crown during his life, and the continuance of such issue male of his body as would have been inheritable to the said estate *tailzie*, and also for such estate and interest as vests in him by the limitation to the heirs whatsoever of A after the substitutions determined; and after the death of B and failure of his issue male, C shall succeed, by virtue of the substitution to the heirs male of the body of A. Foster, 95.—If the estate is limited to A and the heirs male of his body, without any previous limitation to his son B, and B on his father's death becomes entitled as heir of his body, and is attainted of high treason, the whole entail is forfeited by his attainer, as long as there are heirs male of the body of A. Foster, 102.

3. That neither a *right* to (b) a *writ of error* to reverse an erroneous common recovery, (c) nor a mere *right of action* to lands in the hands of a stranger, as of a discontinuee, or of the heir of the disseisor, are forfeited by either of these statutes; (d) but *rights of entry* are as much forfeited as lands in possession. Yet the king shall (e) not be adjudged in possession, by virtue of such a right, without an office, and a *scire facias*, or seisure on such office; for the words, *the king shall be deemed in possession without office*, &c., shall have this construction, that he shall be in possession without office, in the same manner as he should have been on an office found at common law. But at common law, if a disseisee had been attainted of high treason, the king should not have been in possession without office, and a *scire facias* or seisure thereon.

(b) 3 Co. 2, 3, agreed in the Marquis of Winchester's case, Leon. 270, 271; Moore, 125; Hob. 340; Cro. Eliz. 389; Cro. Car. 428; 7 Co. 13; Lit. Rep. 100, S. P. agreed

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(c) 3 Co. 2, 3; Hob. 340; 7 Co. 13; 4 Co. 58 a. (d) 3 Co. 2, 3, 29. (e) 3 Co. 11 a, 4 Co. 58 a; Leon. 21; 9 Co. 95 a.

4. If tenant in tail of the gift of the crown makes a feoffment in fee, and then is attainted of high treason, the right of the entail is forfeited; for it could not be discontinued, because the reversion continued always in the crown; and though it be put in abeyance by the feoffment, as to any benefit which the feoffor could have claimed from it; yet since it is not turned to a right of action, but would have still continued in him for the benefit of the heir, if there had been no attainder, it shall likewise continue in him for the benefit of the crown.

Cro. Car. 427, Stone and Newman's case, and vide Plow. 552.

5. That if one attainted of high treason is seised of a defeasible estate-tail, and hath also a right to an ancient entail, which is discontinued, he forfeits both; for the first is within the express words of 26 H. 8, c. 13, and the other within those of 33 H. 8, c. 20, and it doth not follow, that because naked rights to lands in the hands of a discontinuee, or of the heir of a disseisor, are not within the meaning of the statute, therefore, a right in the party himself is not; for the forfeiture of such naked rights might not only be of dangerous consequence in unsettling possessions, but might also be prejudicial to strangers, whom the statute, by an express saving, plainly intends to favour. But a forfeiture of the offender's right to his own lands can prejudice none but himself and his heirs.

Hob. 334; Palm. 351; 2 Ro. Rep. 305.

6. In the construction of the statute of 33 H. 8, c. 20, it is (a) agreed, that a power of revoking the uses of a settlement may be forfeited by force thereof, if the execution of it require nothing but what may be as well performed by any other person, as by the party himself by whom it was reserved; as the tender of a ring, &c. (b) Neither doth the mention of such considerations, and inducements for the reserving of such a power in the preamble of it, as are inseparable from the person, alter the case, if nothing of this kind be inserted in the proviso itself, by which it is reserved; but (c) if such proviso require any thing of this kind, it prevents the forfeiture; as, if it be worded thus, that if the party should be minded to alter and revoke the uses, and signify his mind in writing under his hand and seal; or (d) if it only require that the revocation be under his hand and seal, without saying any thing about his changing his mind; or as (e) some say, if it only require the tender of a ring by the party, *ipso adtunc declarante* his intent, &c."\*

(a) In Englefield's case, 7 Co. 12, 13; Poph. 18; And. 293; Moore, 303; 4 Leon. 135; Palm. 433; Ro. Rep. 142. (b) Englefield's case adjudged in 7 Co. 12, and the books cited *supra*, and agreed to be law, 2 Keb. 566, 763, 773; Lev. 279; Lane, 44; Ro. Rep. 142. (c) As in the Duke of Norfolk's case, where there was this proviso, that if the duke should be minded to alter and revoke the uses, and signify his mind in writing under his hand and seal, that then, &c., and it was clearly adjudged, that the power of revocation was not forfeitable, because it depended on the duke's signifying his mind in writing under his proper hand and seal, which none but himself could do. 7 Co. 13; cited and agreed; Lev. 279; 2 Keb. 566, 763, 773; 3 Inst. 19. (d) Mod. 16, 38; Lev. 279; Main's case. (e) Vide Palm. 429; Latch. 25, 26, 70, 102; Jon. 135; Vent. 129; Mod. 40.—\*A, who is tenant for life, with power to make leases for three lives, or twenty-one years, makes a lease to trustees for ninety-nine years, if he so long live, for payment of his debts; and appoints them his attorneys, to make leases pursuant to the power; A is outlawed for high treason: It is agreed, that the authority given to the trustees to act as attorneys was destroyed by the attainder. Attorney-General v. Bradyll, Bunb. 92. But A having in this case only a particular power could not make a lease by letter of attorney by force of his power. Lady Gresham's case, 9 Co. 76 a, cited; 2 Ro. Rep. 393.||

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7. That neither an (a) annuity granted *pro consilio impendendo*, (b) nor an office granted for life, and requiring skill and confidence, is forfeitable by these statutes; but such office in fee may be forfeited without the aid of them, because the grantor, in giving an estate descendible to all the heirs of the grantee, however qualified, appears not to have been induced to make his grant from the consideration of the peculiar merit of the persons who are to execute the office.

(a) Plowd. 381. (b) Plowd. 379, and vide tit. *Office and Officers*.

|| A dignity is forfeited by the attainder for treason of the person possessed of it; as, where Charles Nevill, Earl of Westmoreland, to him and the heirs male of his body, by letters patent, was attainted of high treason by outlawry, and by act of parliament, and died without issue male; whereupon Edward Nevill claimed to be Earl of Westmoreland, as heir male of the body of the first grantee; it was resolved by all the judges, that although the dignity was within the statute *De donis conditionalibus*, yet that it was forfeited by a condition in law *tacitè* annexed to the estate of the dignity. For an earl has an office of trust and confidence; and when such a person, against the duty and end of his dignity, takes not only counsel, but also arms against the king to destroy him, and therefore is attainted by due course of law, by that he hath forfeited his dignity; in the same manner as if tenant in tail of an office of trust misuse it, or use it not; these are forfeitures of such office for ever by force of a condition in law *tacitè* annexed to their estates. It was also resolved, that if it had not been forfeited by the common law, it would have been forfeited by the statute of 26 H. 8; for it was an *hereditament*, and Charles had an estate of inheritance in it.

Nevill's case, 7 Co. 33.

But where a tenant in tail of a dignity is attainted of felony, the dignity is forfeited only during his life, and after his decease it vests in the person entitled to it *per formam doni*. The statute of 26 H. 8 does not extend to this case. Thus, where Lawrence Earl Ferrers, to whose ancestor the dignity had been granted by letters patent in 1711, to hold to him and the heirs male of his body, was convicted and executed for murder in the year 1760; the dignity was not forfeited, but upon his death without issue, it descended to his brother Washington Ferrers, who took his seat accordingly.

Earl Ferrers' case, 2 Eden, 373.

Although the statute of 33 H. 8, c. 10, made attainders at common law as effectual as parliamentary attainders, as well in regard to uses as possessions; yet in the King v. Dacombe, the judges all held, and so it was resolved in Abington's case, that a trust in a freehold was not forfeited by an attainder of treason.

Cro. Ja. 513. With this decision, says Mr. Sugden, Lord Hale quarrels, and gives it as his opinion that the statute of 33 H. 8 extends to trusts, such as were then in practice and retained in Chancery, 1 H. H. P. C. 248; and accordingly, in a case which came before him, when he was chief baron, he and Baron Turner agreed, that a trust in fee, or fee-tail, was forfeited under the statute by attainder of treason; Attorney-General v. Sands, 2 Freem. 120; Hardr. 495; but see Ibid. 494, and so the law is laid down by modern writers. But the observation in Sands's case was merely an *obiter dictum*, and there is an express decision the other way, which may be thought to be founded in reason, because it is not pretended that the statute of 26 H. 8 can embrace trusts which have succeeded to uses (the uses referred to in that act having been destroyed by the statute of uses 27 H. 8, c. 10); and it does not appear to have been the intention of 33 H. 8, to create a forfeiture of any equitable estates which had sprung up since the act of 26 H. 8. The statute had other objects. Sugden's Gilb. Uses, 78, note. ||

(D) To what Time the Forfeiture shall have Relation.

By an act of parliament made 13 Car. 2, it was enacted, *that all the manors, messuages, lands, tenements, possessions and reversions, remainders, rights, interests, hereditaments, leases, chattels real, and other things of what nature soever, that Sir John Danvers, or any others to his use, or in trust for him had the 25th of March, 1646, or at any time after, should be forfeited to the king; and it was adjudged, that by force of these words, all interests of what nature soever, an estate-tail was forfeited.*

Browne v. Wayte, 2 Lev. 169; 2 Jon. 57, S. C.; 2 Mod. 130, S. C.; 3 Keb. 452, 651, 712, S. C.; Vent. 299, S. C.; Pollex. 181, S. C.

But it is holden, that the statutes of *præmunire*, which give a general forfeiture of all the lands and tenements of the offender, extend not to lands in tail.

Co. Lit. 130.

It is agreed, that a saving against corruption of blood in a statute concerning *felony* saves the land to the heir, because the escheat to the lord for felony is only *pro defectu tenentis*, occasioned by the corruption of blood: also, the saving of the land to the heir saves the corruption of blood and loss of dower.

Hale's P. C. 8; 3 Inst. 47.

But a saving against the corruption of blood in a statute concerning *high treason* does not save the land to the heir, because the land goes to the king by way of *immediate forfeiture*, and not by way of escheat.

Sir Salathiel Lovel's case, Salk. 85.

(D) To what Time the Forfeiture shall have Relation.

THE forfeiture upon an attainder, either of *treason* or *felony*, shall have relation to the (a) *time of the offence*, for the avoiding all subsequent alienations of the *lands*; but to the time of the conviction, or *fugam fecit* found, &c., only as to *chattels*, unless the party were killed in flying from, or resisting those who had arrested him; in which case it is said, that the forfeiture shall relate to the time of the offence.

Plowd. 488 b; Co. Lit. 2 b; 8 Co. 170. (a) That if the time proved varies from that laid in the indictment, and the jury find the defendant guilty generally, the forfeiture shall relate to the time laid, till the verdict be falsified by the party interested, as it may be in this respect, though not as to the point of the offence. Hale's P. C. 264, 270; 3 Inst. 230.—But, if the jury find the defendant guilty on the day on which the fact is proved, whether before or after the day laid in the indictment, in such case the forfeiture shall relate to the day so specially found. Kelynge, 16; Hale's P. C. 264; 2 Inst. 318; 2 Inst. 230.

No attainder whatsoever shall have any relation as to the mesne profits of the lands of the person attainted, (b) but only from the time of the attainder.

8 Co. 170; Plowd. 488. (b) Whether in a *præmunire* the forfeiture shall relate to the time of the offence, or only to that of judgment, *qu.* and vide Cro. Car. 172; Jon. 217, and tit. *Præmunire*.

The forfeiture of a person becoming *felo de se* has relation to the time the mortal wound was given, so that all intermediate alienations are avoided.

Plowd. 260; 5 Co. 110; Hale's P. C. 29.

When a forfeiture of goods and chattels is imposed for the violation of an act of the legislature, and a right to sue for such violation is given by statute, the right to the property does not *ipso facto* vest in the party to whom the property is given, by the prohibited act being done, but a

(E) What is to be done with the Offender's Goods.

proceeding in a court of law must be had adjudging the forfeiture, and declaring the party entitled to the property.

Fire Department of New York v. Kip, 10 Wend. 266.g

(E) What is to be done with the Offender's Goods before Conviction.

It has always been holden, that one indicted or appealed of treason or felony may, *bonâ fide*, sell any of his chattels, real or personal, for the sustenance of himself and family, until they be actually forfeited.

8 Co. 171.

But, where a person being in Newgate for robbery and burglary, before conviction, made a bill of sale of all his goods to his son; on trover brought by the son against the sheriffs of London, it was holden by Holt that the bill was fraudulent, and that though a sale, *bonâ fide*, and for a valuable consideration, had been good, because the party had a property in the goods till conviction, and ought to be reasonably sustained out of them, yet that such a conveyance as this cannot be intended to any other purpose than to prevent a forfeiture and defraud the king; and this he said was a fraud at common law.

Skin. 357, Jones and Ashurt.

It seems the better opinion, that at (a) this day, before indictment, the goods of the offender cannot be searched and inventoried, and that after indictment they cannot be seized and taken away till the felon is convicted, for till the conviction the property remains in the felon.

3 Inst. 229; Bridg. 77; Hale's P. C. 269. (a) That according to the general tenor of the old books, the goods of one arrested for treason or felony may, by the purview of an ancient statute, which seems to continue still in force, be immediately inventoried and appraised; after which, and on surety found that they shall be forthcoming, they shall be kept by the bailiffs of the party arrested, and for want of such surety by his neighbours, till he be convicted, or found to have fled, &c., whereby they are actually forfeited, vide 2 Hawk. P. C. c. 49, § 35, and the authorities there cited.

And by the 1 R. 3, c. 3, it is enacted, "That no sheriff, under-sheriff, nor escheator, bailiff of franchise, nor any other person, take or seize the goods of any person arrested or imprisoned for suspicion of felony, before that the same person so arrested and imprisoned be convicted or attainted of such felony according to the law, or else the same goods otherwise lawfully forfeited, upon pain to forfeit the double value of the goods so taken to him that is so hurt in that behalf by (b) action of debt, to be pursued by like process, judgment and execution, as is commonly used in other actions of debt sued at the common law; and that no essoin or protection be allowed in any such action; nor that the defendant in any such action be admitted to wage or do his law."

(b) For precedents of such actions, vide Lutw. 132; Cro. Eliz. 749.

This statute is said to be in affirmance of the common law, (c) and hath been (d) adjudged to extend as well to the seizure of money, as of any other chattel.

(c) || It certainly is so. Vide Bract. 136 b, 137; 43 E. 3, 24; Fitzh. Trespass, pl. 7; Barre, pl. 196; || 8 Co. 171. (d) Raym. 414.

It seems plain from this statute, that goods may be seized as soon as they are forfeited; and it seems the whole township is answerable for them to the king, and may seize them wherever they can be found.

Co. Lit. 394; 2 Hawk. P. C. c. 49, § 40, and several ancient authorities there cited.

And at common law it was no plea for such township, that the goods

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were delivered to the custody of J S who embezzled them, &c., but it is enacted by 31 E. 3, c. 3, "That if any man or town be charged in the Exchequer by estreats of the justices of the chattels of fugitives and felons, and will allege in discharge of him another which is chargeable, he shall be heard, and right done to the other."

2 Hawk. P. C. c. 49, § 41.

(F) Where the Wife shall lose her Dower.

BEFORE the statute of 1 E. 6, c. 12, the wife not only lost her dower at common law, but also her dower *ad ostium ecclesie*, or *ex assensu patris*, or by special custom, (except that of gavelkind,) by the husband's attainder of treason or (a) capital felony, whether committed before or after the marriage.

Co. Lit. 31 b, 37 a, 41 a, 392 b; F. N. B. 150; Perk. § 308; Bro. tit. *Dower*, 82; Plowd. 261. (a) That the wife of a *felô de se* shall have dower. Plowd. 261, 262; Dame Hale's case.—So, if the husband be outlawed in trespass or any civil action; for this works no corruption of blood, or forfeiture of lands. Perk. § 388; Co. 31 a.—So, if the husband be attainted of heresy, for this is only a spiritual offence. Co. Lit. 31.—So, if the husband or wife be excommunicated. Co. Lit. 31.—So, if either the husband or wife be attainted in a *præmunire*, she shall be endowed; but for this vide Co. Lit. 134, and tit. *Præmunire*.

But the wife never forfeited lands given jointly to her husband and her, whether by way of frank-marriage, or otherwise, but only for the year and day, and waste.

Co. Lit. 37; 3 Inst. 216.

It is enacted by 1 E. 6, c. 12, § 17, "That albeit any person shall be attainted of any treason or felony (b) whatsoever; yet that notwithstanding every woman, that shall fortune to be the wife of the person so attainted, shall be endowable and enabled to demand, have, and enjoy her dower, in like manner and form as though her husband had not been attainted," &c.

(b) || This had been attempted in former parliaments in cases of felony, but without success. See a petition to this effect from the Commons in 1 E. 3, Rot. Parl. vol. ii. 8, 13. || *β*Hogle v. Stewart, 8 Johns. 104.g

But this is repealed as to treason by 5 & 6 E. 6, c. 11, § 13, by which it is enacted, "That the wife, whose husband shall be attainted of any treason (c) whatsoever, shall in no wise be received to ask, challenge, demand, or have dower of any the lands, tenements, or hereditaments of the person so attainted, during the said attainder in force."

(c) This act extends to an attainder of petit treason, as well as to an attainder of high treason; Staundf. 195; Dyer, 140, pl. 42; Co. Lit. 37 a, 392 b.—But not to misprision of treason. Co. Lit. 37 a; Moore, 639; Dyer, 97, pl. 49; 13 Co. 19.

If the husband seised of lands in fee makes a feoffment, and then commits treason and is attainted of it, the wife shall not recover dower against the feoffee.

Gate v. Wiseman, Pendl. 56; Dyer, 140, S. C.; Co. Lit. 41 a, S. C. See note (3) in Co. Lit. 41 a.

So, (b) if the husband is attainted of treason, and afterwards pardoned, yet the wife shall not recover dower; but (c) of lands purchased by the husband after the pardon the wife shall be endowed.

(b) 3 Leon. 3. (c) Perk. § 391.

|| If a woman be attainted of treason or felony, she will thereby lose her dower; but, if she be pardoned in her husband's lifetime, she may then



(G) How far the Blood of the Offender is corrupted.

demand it, though he should have aliened in the mean time; for when this impediment is once removed, her capacity to be endowed is restored.

Co. Lit. 33 a; 13 Co. 23.¶

If a husband having levied a fine with proclamations is erroneously attainted of treason, and the five years pass after his death, and then the outlawry is reversed, the fine and nonclaim are no bar till five years are passed after the reversal, because the wife could not sue for her dower while the attainer stood in force, neither could she any way reverse it.

2 Inst. 216; Moore, 639, pl. 879.

After the making of the statute 1 E. 6, c. 12, it seems to have been doubted, whether the wife should not lose her dower in case of any new felony made by act of parliament; and therefore where several offences have been made felony since, care has been taken to provide for the wife's dower.

For this vide tit. *Dower*.

β A subject of the British government was seised of lands and died in 1752, leaving children in Great Britain, who intermarried there, so that neither the children nor their husbands were American citizens; held, that although the marriages were after the revolution, the rights of the wives were not impaired, especially after the treaty of November, 1794, with that country.

Jackson ex dem. Gansevoort v. Lunn, 3 John. Ch. R. 109.g

(G) How far the Blood of the Offender is corrupted.

It is clearly agreed, that by an attainder of treason or (a) felony, the blood of the offender is so far stained or corrupted that the party loses all the nobility or gentility he may have had before, and becomes ignoble.

Co. Lit. 8, 41; 3 Inst. 211; Staundf. P. C. 195. (a) But an attainder of piracy corrupts not the blood. Co. Lit. 391.—Nor of petit larceny; 3 Inst. 211; Co. Lit. 41 a; Noy, 170. β The constitution of the United States provides, art. 3, s. 3, n. 2, that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained."g

Also, it is clearly agreed, that he can neither inherit as heir to any ancestor, nor have an heir; and the policy of the law herein is to make men more mindful of their allegiance, and to deter them from taking up arms against the crown; for as the natural love men have for their posterity often restrains them from actions which would prejudice them, either by entailing the infamy of such actions on them, or making them sharers in the punishment which the law has appointed for such offences; so men are less careful of their persons, when their miscarriages will not involve their children in the guilt or punishment of them.

Co. Lit. 8 a, 301 b, 392; Staundf. P. C. 165; Bro. *Nonability*, 21; Cro. 66.

Therefore it is (b) laid down as a sure rule, that wherever it is necessary for any one, who would make a title to another, to derive the descent through him, the attainder is an effectual bar to such title, (c) unless the lands were entailed, in which case he claims *per formam doni*, and paramount his title.

(b) As in Cro. Car. 543; Lit. Rep. 28; Noy, 159; Vent. 413, 417; Lev. 60; Sid. 200. (c) Lit. 2746; 3 Co. 10; 8 Co. 166 a.—And therefore, if the grandfather be seised in tail, and the father be attainted of treason since the 26 H. 8, c. 13, and die in the life of the grandfather, the son shall inherit the grandfather; for the son is heir *per formam doni* to the tail, which is originally not forfeitable, and by that statute the father forfeits only the lands and rights that he hath in him. Co. Lit. 8; 3 Co. 10, Dowty's case. ¶ And the law is the same in the case of a dignity entailed; for the son surviving

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an attainted father, who never was possessed of the dignity, may claim from the first acquirer *per formam doni*, as heir male of his body, within the description of the gift, without being affected by the attainder of his father, or any other lineal or collateral ancestor. See the Duke of Athol's case, Journ. vol. 30. 466—469. On the other hand, if the dignity be descendible to heirs general, the attainder for treason or felony of any ancestor of a person claiming the dignity through whom the claimant must derive his title, though the person attainted was never possessed of the dignity, will bar the claim; for the blood of the person attainted being corrupted, no pedigree can be derived through him, so that the dignity becomes vested in the crown by escheat, and is thereby destroyed. See the case of the Barony of Lumley, and Cruise's Dig. 106.]]

As, if there be a grandfather, father and son, and the father be attainted, the son, cannot claim as heir to the grandfather of the lands in fee-simple, because he must of necessity derive the descent through the father, which by reason of the attainder he cannot do.

Co. Lit. 392; Dalis. 14, pl. 3; Vent. 416.

So, if there be two brothers, and one of them having issue a son be attainted, and either the son or uncle purchase land, and die without issue, the other cannot be his heir, because the blood of the father, through whom the descent must be conveyed, is corrupted.

Dyer, 274, pl. 40; Cro. Car. 543; Vent. 413, 416, 425.

But it is also a general rule, that the attainder of a person, who needs not be mentioned in the conveyance of the descent, does no hurt, let the ancestor be never so remote; and that therefore where any one may claim as immediate heir to another, without deriving the descent through any other, he shall not be barred by the attainder of any other.

Lit. Rep. 28; Noy, 159, 166; Lev. 60; Sid. 200; Vent. 413.

As, if the son of one attainted purchase land, and have a son and die, such son shall inherit, because he derives his descent immediately from him.

Vent. 416.

So, if a man have two sons, and be attainted, and one of the sons purchase lands and die without issue, the other shall be his heir, because he may make his title without mentioning the father; and therefore there is no disability in the one to be represented, or in the other to represent.

Co. Lit. 8 a; 4 Leon. 5; Cro. Ja. 539; Ro. Abr. 625, pl. 5; Cro. Car. 543; Palm. 19; Lev. 59; Vent. 425; 2 Ro. Rep. 93; 2 Sid. 25, 27; Moore, 569, pl. 775; Noy, 158; Lit. Rep. 28.—But my Lord Coke says, that the reason of this case is, because the attainder of the father corrupts only the lineal blood, and not the collateral blood between the brethren, which was vested in them before the attainder; but he saith, that some have holden, that if a man, after he be attainted, have issue two sons, the one cannot be heir to the other, because they could not be heir to their father, for that they never had any inheritable blood in them. Co. Lit. 8 a.—But the ground of this opinion is overthrown by the resolution in the case of Collingwood and Pace, wherein it was adjudged in the Exchequer-chamber by seven judges against three, that the sons of an alien might be heirs one to another, if born in England, or naturalized, though it is certain they could not be heirs to their father. Sid. 193; Hard. 224; Vent. 413; Lev. 59. And therefore it seems now settled, that such sons, whether born before or after the attainder of their father, may inherit each other. As to this see tit. *Aliens*.

So, where a person attainted hath issue by a woman seised of lands of inheritance, such issue may inherit the mother, though he never had any inheritable blood from the father.

Noy, 159, 167; Staundf. P. C. 196; 2 Sid. 248; Cro. Ja. 539; Lit. Rep. 28; Lev. 59; Sid. 201; Vent. 422; Co. Lit. 84 b.

If the father of a person attainted die seised of an estate of inheritance during his life, no younger brother can be heir, but the land shall rather escheat; for the elder brother, though attainted, is still a brother, and no

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other can be heir to the father while he is alive ; but if he die before the father, the younger brother shall be heir, because there is no default in the father to be represented, nor in the younger son to represent the father after the death of his brother.

Co. Lit. a, 13 a ; Noy, 166, 170 ; Lev. 60 ; Sid. 195 ; Vent. 413.

But, if the eldest son had left issue and died, such issue could not have inherited, but such lands must have escheated, because the eldest son could not have represented the grandfather, but by the mediation of the father. and as standing in his stead ; and that in this case he could not do, because the father can have no representatives ; and the younger son could not inherit, because the elder line is still continuing, which excludes the younger.

Dyer, 48.

If a man be seised of lands in fee, and have issue two daughters, and one of them be attainted of felony, and the father die, both daughters being alive, one moiety shall descend to the innocent daughter, and the other moiety shall escheat.

Co. Lit. 163 b.

But, if a man make a lease for life, remainder to the right heirs of A being dead, who hath issue two daughters, whereof one is attainted of felony, it seems the remainder is not good for a moiety, but void for the whole.

Co. Lit. 163 b.

For in the first case the lord by escheat must make a title to devest the estate which was once lawfully vested in the ancestor ; which he cannot do, because there is no defect in this case, since the ancestor may be legally represented, and the innocent daughter may legally represent ; and therefore there can be no title in the lord to evict that moiety, though he has title to the moiety of the offending daughter, who after her crime can represent no man. But in the second case, the sisters are to make title to the remainder, which they cannot do, because to make title to the remainder, they must bring themselves within the words of the gift ; and the innocent daughter cannot take upon her the character of an heir alone, since they both make but one heir to the ancestor ; and both cannot join, because one is attainted and incapable of that character.

Co. Lit. 163 b.

Although a person attainted be to many purposes looked upon as dead in law, yet he hath a capacity to purchase land, which the king shall have upon office found, and not the lord of the fee, because his person being forfeited to the king he cannot purchase but for the king.

Co. Lit. 2 b.

But, if a man attainted be pardoned by act of parliament he may purchase as before, for he is totally restored and inheritable to all persons. But, if he be pardoned by charter, he may thenceforth purchase lands, but cannot inherit his former relations ; for the king's charter cannot alter the law or take away the right of others, or restore the relation that was lost.

Co. Lit. 8 a, 391 b, 392 b ; Stam. P. C. 195 ; 3 Inst. 233 ; Dalis. 14, pl. 3.

If a man be attainted and after pardoned by charter, the children born before such pardon shall not inherit ; but, if they fail, the children born after such pardon may inherit him ; for the pardon makes him capable of *new relations* as well as of *new purchases*, though all the old legal benefit and relations are lost.

Noy, 170 ; Co. Lit. 8 a ; 3 Inst. 233.

(H) Forfeitures under the Laws of the United States.

|| By st. 54 G. 3, c. 145, "No attainder for felony, save and except in cases of the crime of high treason, or of the crimes of petit treason or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right of interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders should or might have appertained, if no such attainder had been, to enter into the same."||

β (H) Forfeitures under the Laws of the United States.

β UNDER this head will be given an abstract of the cases ruled on general principles; the insertion of all cases, decided on the expressions of particular statutes, would have perhaps unnecessarily swelled it.

The property of an owner may be forfeited, in many cases, for an offence committed without his knowledge or procurement.

Cross v. The United States, 1 Gallis. C. C. R. 26.

A *bonâ fide* purchaser, without notice, is protected against antecedent forfeiture to the United States.

The Mars, 1 Gallis. C. C. R. 192. See The Ploughboy, 1 Gallis. C. C. R. 41.

A municipal forfeiture under the laws of the United States is absorbed in more general operation of the laws of war.

The Sally, Porter Master, 8 Cranch, 382.

Until office found, forfeited property remains in its owner or his alienee, subject to its being divested upon a conviction.

Cross v. The United States, 1 Gallis. C. C. R. 26. But see Gelston v. Hoyt, 3 Wheat. 246.

The party claiming a forfeiture or penalty, is, in general, bound to make out his case; and when it involves a negative, it must be proved.

United States v. Hayward, 2 Gallis. 485.

The spirit of the acts of Congress, in relation to the revenue, is not to create a forfeiture of property, except for acts of the owner, attended with fraud, misconduct, or negligence. (a) Wines and spirits saved from a wreck and landed, are, therefore, not liable to forfeiture, because they are unaccompanied with such marks and certificates as are required by law, nor because they were removed without the consent of the collector, before the quantity and quality were ascertained and the duties paid. (b)

(a) 651 Chests of Tea v. The United States, Paine's C. C. R. 499. (b) Peisch v. Ware, 4 Cranch, 347.

When the law under which a forfeiture has accrued has expired, no sentence of condemnation can be affirmed.

The Schooner Rachel v. The United States, 6 Cranch, 29.

When property has been captured by pirates, the property of the original owners cannot be forfeited for the misconduct of the captors in violating the municipal laws of the country where the captors have carried it. But when the capture is made by a regularly commissioned captor, he acquires a title to the property so captured, which can be divested only by recapture or the sentence of a competent tribunal. The property is therefore subjected to forfeiture for a violation by the captors of the laws of the neutral country into which it may be carried.

The Josefa Segunda, 5 Wheat. 338.g

## FORGERY.

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FORGERY at common law is an offence in falsely and fraudulently making or altering any matter of record, or any other authentic matter of a public nature, as a parish register, or any deed or will, and punishable with fine and imprisonment, and such other corporeal punishment as the court in discretion shall think proper.

Hawk. P. C. c. 70, § 1; 4 Bl. Comb. 247. Forgery is defined by Blackstone, 4 Comm. 247, to be "the fraudulently making and alteration of a writing to the prejudice of another man's right." By a more modern writer, it is defined, as "a false making; a making *malo animo*, of any written instrument, for the purpose of fraud and deceit." 2 East, P. C. 852. This offence, at common law, is of the degree of misdemeanor. The term forgery is also applied to the making of false or counterfeit coin. See Bouv. L. D. h. t. See for other definitions of forgery, 3 Chit. Cr. Law, 1022; The People v. Fitch, 1 Wend. 198.*g*

But the mischiefs of this kind increasing, it was found necessary to guard against them by more sanguinary laws. Hence we have several acts of parliament declaring what offences amount to forgery, and inflicting severer punishments than there were at the common law.

Therefore it will be necessary to consider,

- (A) In what Cases the making or altering of a Writing shall be said to be so far false and fraudulent as to amount to Forgery.
  - (B) Of what Nature or Kind the Writing must be to constitute the Offence Forgery at Common Law.
  - (C) What Offences of this Kind are made Forgery by Statute, and of the Punishment to be inflicted on Persons guilty of Forgery.
  - β(D) Of the Offence of uttering a forged Instrument.*g*
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- (A) In what Cases the making or altering of a Writing shall be said to be so far false and fraudulent as to amount to Forgery.

THE notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, which may often be done innocently, but in the endeavouring to give appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation, which in truth and justice it ought not to have.

Hawk. P. C. c. 70, § 2; 2 Ro. Abr. 28, 29; 11 Co. 27. [It was said in argument, and seemingly adopted by the court in the case of Tatlock v. Harris, 3 T. R. 176, that it is no answer to the charge of forgery to say that there was no *special intent* to defraud any *particular person*, because a *general intent* to defraud is sufficient to constitute the crime; for if a person do an act, the *probable consequence* of which is to defraud, it will, in contemplation of law, constitute a fraudulent intent.] || In an indictment for forgery it is sufficient to aver a *general intent to defraud a particular person*, which intention may be made out by the facts in evidence at the trial. R. v. Powell, 1 Leach's Ca. 77; 2 Bl. Rep. 787, S. C. ||

Hence it is holden to be forgery for a man to make a (a) feoffment of certain lands to JS, and afterwards make a deed of feoffment of the same

(A) What making or altering shall amount to Forgery.

lands to J D, of a date prior to that of the feoffment to J S, for herein he falsifies the date in order to defraud his own feoffee by making a second conveyance, which at the time he had no power to make.

3 Inst. 169; Pult. 46 b; 27 H. 6; 3 Hawk. P. C. c. 70, § 2. (a) So, if by his first conveyance he had passed only an equitable interest for good consideration, and had afterwards by such a subsequent antiquated conveyance endeavoured to avoid it. Moore, 665.

Also, it is forgery for a man, who is ordered to draw a will for a sick person, to insert legacies in it of his own head.

Noy, 101; Moore, 759; 3 Inst. 170; Hawk. P. C. c. 70, § 2 *cont.* Dyer, 288 b.

So, if one inserts in an indictment the names of those against whom in truth it was not found, this is forgery.

3 Mod. 66; Hawk. P. C. c. 70, § 2.

So, where one finding another's name at the bottom of a letter, at a considerable distance from the other writing, causes the letter to be cut off, and a general release to be written above the name, and then takes off the seal and fixes it under the release.

3 Inst. 171; Hawk. P. C. c. 70, § 2. βOne who by false pretences gets pieces of paper at the bottom of which a merchant had written his name, and which had been left with his clerk for the purpose of having notes written upon them, and makes notes other than such as were intended, is guilty of forgery. Putnam v. Sullivan, 4 Mass. 45. g

Also, the making any fraudulent alteration of the form of a true deed, in a material part of it, is forgery; as the making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D into S, or by making a bond for five hundred pounds expressed in figures seem to have been made for five thousand, by adding a new cipher.

Moore, 619; Hawk. P. C. c. 70, § 2. But in 3 Inst. 169, my Lord Coke seems to think, that a deed so altered is more properly to be called a false than a forged deed. But by Hawkins this is forgery; for a man's hand and seal are as falsely made use of to testify his assent to an instrument, which after such an alteration is no more his deed than a stranger's. Hawk. P. C. c. 70, § 2. [In all forgeries, indeed, the instrument itself must be false; and therefore, if a person give a note entirely *as his own* and *on his own account*, his subscribing it with a fictitious name will not make it a forgery. But, if he gives the note in a different character than that which he really bears, as, if pretending to be the executor of A he receives money from B on account of his supposed testator, and gives a note for it as and in the name of executor of A, this is a forgery; for in this case the instrument is false in itself. Dun's case, Leach's Cases, 54.]

|| So, if a note be made payable at a country banker's, or at his banker's in London, who fails; it is forgery to alter the name of that London banker to the name of another London banker, with whom the drawer makes his notes payable after the failure of the first; for this act is a false making, in a circumstance material to the value of the note and its facility of transfer, by making it payable at a solvent instead of an insolvent house.

R. v. Treble, 2 Taunt. 328. ||

But, as the fraud and intention to deceive, by imposing upon the world that as the act of another, which he never consented to, are the chief ingredients which constitute this offence; so it hath been holden, that he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks upon this as the other's hand and sealing, being done by his approbation and command.

Pult. 46; 21 H. 6, 4 b; Hawk. P. C. c. 70, § 3.

So, if a man writes a will for another without any directions from him, and he for whom it is written become *non compos* before it is brought to

(A) What making or altering shall amount to Forgery.

him, it is not forgery; for it is not the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery.

Moore, 760.

Also, he cannot be punished as guilty of forgery, who raseth the word *libris* out of a bond made to himself, and putteth in *marcis*, because here is no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by it. Yet it seems to be forgery, if by the circumstances of the case it should any way appear to have been done with an eye of gaining an advantage to the party himself, or of prejudicing a third person. Also, it is holden, that such an alteration, even without these circumstances, is a misdeameanor though it be not forgery.

Moore, 619; Noy, 99; Salk. 375. See *Commonwealth v. Ludd*, 15 Mass. 526; *Commonwealth v. Fisher*, 17 Mass. 46.

It seems, that by a bare nonfeasance a man cannot be said to be guilty of forgery; as, if a man in drawing a will omits a legacy which he is directed to insert: yet it hath been holden, that if the omission of a bequest to one cause a material alteration in the limitation of a bequest to another, as, where the omission of a devise of an estate for life to one man causeth a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, he who makes such an omission is guilty of forgery.

Moore, 762; Noy, 101.

But it seems to be no way material, whether a forged instrument be made in such a manner, that if it were in truth such as it is counterfeited for, it would be of validity or not; and upon this ground it hath been adjudged, that the forgery of a protection in the name of A B as being a member of parliament, who in truth, at the time, was not a member, is as much a crime as if he were.

Hawk. P. C. c. 70, § 7; Sid. 142.

|| Forging a bill of exchange payable to the prisoners' own or order, and uttering it without endorsement as a security for a debt, was holden to be a complete offence.

*Rex v. Birkett*, Russ. & Ry. 86.

The offence of disposing and putting away forged notes is complete, though the person to whom they are disposed of be an agent for the bank to detect utterers, and applies to the prisoner to purchase forged notes.

*Rex v. Holden*, Russ. & Ry. 154.

Uttering a forged stock receipt to a person who employed the prisoner to buy stock, and advanced the money, was held sufficient evidence of an intent to defraud that person, and this, notwithstanding the person made oath that he believed the prisoner had no such intent.

*Rex v. Sheppard*, Russ. & Ry. 169.

The jury ought to infer an intent to defraud the person who would have to pay the instrument if genuine, although from the manner of executing the forgery it would not be likely to impose on him, and although the object be generally to defraud the person taking the instrument.

*Rex v. Mazagora*, Russ. & Ry. 291.

(B) Of what Nature or Kind the Writing must be, &c.

Altering a banker's one pound note, by substituting the word *ten* for *one* is a forgery.

Rex v. Port, Russ. & Ry. 101.

And discharging one endorsement and inserting another, or making it thereby a general instead of a special endorsement, has been holden to be altering an endorsement.

Rex v. Birkett, Russ. & Ry. 251.

Issuing a bill drawn by the prisoner in his own name, and accepted by the drawee, and adding a false description of the drawee, where there is no real person answering such description, is not a forgery.

Rex v. Webb, Russ. & Ry. 405; and see Rex v. Watts, Ibid. 436.

A conviction of forgery was held right by the judges, where the name used by the prisoner in the forged instrument was assumed by him with intention of defrauding the prosecutor, though the prosecutor admitted that the prisoner's real name would have carried with it as much credit as the assumed name.

Whiley's Case Russ. & Ry. 90; and see Rex v. Marshall, Ibid. 75.

And if the assumed name be used for the purpose of fraud, and to avoid detection, it matters not whether it is the name of a person of credit or not.

Francis's Ca., Russ. & Ry. 209; Rex v. Bontien, Ib. 260; Rex v. Peacock, Russ. & Ry. 278.

On an indictment for forging a will, the probate of that will unrevoked is not conclusive evidence of its validity, so as to bar a prosecution.

Rex v. Buttery and Macnamara, Russ. & Ry. 342.||

β When the prisoner uttered a forged acceptance knowingly, and believing that money would be advanced by the bankers on it; held that it was not less a felony that he intended to take up the bill and afterwards paid it, the offence being complete at the time of uttering it.

R. v. Geach, 9 Car. & P. 499. See Reg. v. Phetheon, 9 C. & P. 552.

The forgery of any writing which may be prejudicial to another is indictable at common law.

Pennsylvania v. M'Kee, Addis. 33.

The forgery of a name to the assignment of a bond, is indictable although there be no seal to the forged assignment.

Pennsylvania v. Mismar, Addis. 44.

A person for a series of years forged the name of his friend as an endorser on his notes and bills, with the knowledge of his friend, who, although judgments were obtained against him on such forged instruments, never disavowed such acts until the forger had fled and absconded. In a case where the supposed endorser was sued and suffered a default, and attempted no defence until after the escape of the forger, it was held that proof of these facts was admissible in evidence, and that from such facts the jury might imply an authority from the endorser to the maker thus to use his name.

Weed v. Carpenter, 4 Wend. 219.g

(B) Of what Nature or Kind the Writing must be to constitute the Offence Forgery at Common Law.

It is clearly agreed, that at common law the counterfeiting of a matter of record is forgery; for, since the law gives the highest credit to all



(B) Of what Nature or Kind the Writing must be, &c.

records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified.

Re. Abr. 65, 76; Yelv. 146; Cro. Eliz. 178; 3 Mod. 66.

Also, it is agreed to be forgery to counterfeit any other authentic matter of a public nature, as (a) a privy seal, or (b) a license from the barons of the exchequer to compound a debt, or (c) a certificate of holy orders, or (d) a protection from a parliament man.

(a) Ro. Abr. 68, pl. 33; Cro. Car. 326; Jon. 325. (b) Ro. Abr. 65, pl. 5; 2 Buls. 137. (c) Lev. 138. (d) Sid. 142.

It is also unquestionable, that a man may be in like manner guilty of forgery at common law by forging (e) a deed; and therefore it seems, that one may be equally guilty by forging (g) a will, which cannot be thought to be of less consequence than a deed.

(e) Ro. Abr. 66, pl. 10; Raym. 81; Owen, 47; Sid. 278; 3 Leon. 170. (g) Moore, 760; Noy, 101; Dyer, 302, and Hawk. P. C. c. 70, § 10, where it is said, that he cannot find this point any where directly holden.—[But see *infra*, and the next head.]

There seem to be some strong opinions in the (h) books, that the counterfeiting of any writings of an inferior nature to those above mentioned, is not forgery at the common law. Also, it hath been (i) holden, that the forging of another's hand, and thereby receiving rent due to him from his tenants, is not punishable at all. But by (k) Hawkins, it cannot surely be proved by any good authorities, that such base crimes are wholly disregarded by the common law, as not deserving a public prosecution; for the opinion, that they are punishable by no law, seems by no means to be maintainable, since many of them are most certainly punishable by force of 33 H. 8, c. 1. Neither can it be a convincing argument, that they are not punishable by common law, (l) because they are of a private nature; since deeds concerning private matters are also of a private nature; as much as other writings concerning other matters; yet no one will say, that the making of a false deed concerning a private matter is not punishable at common law. But, perhaps, says he, it may be reasonable to make this distinction between the counterfeiting of such writings, the forgery whereof, as in the above cases, is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature; that the former is in itself criminal, whether any third person be actually injured thereby or not; but that the latter is no crime unless some one receive a prejudice from it.

(h) Ro. Rep. 431; Sid. 16, 155, 451; Ro. Abr. 66, pl. 8, 9; Winch. 40, 90; 3 Leon. 231; Leon. 101; Cro. Eliz. 296, 853; 3 Buls. 265. (i) Cro. Eliz. 166; Yelv. 146; 3 Buls. 265. (k) Hawk. P. C. c. 70, § 11. (l) Yelv. 146.

But these opinions came fully to be considered in a late noted case, where it was holden, that the principle extended to instruments of every sort, though without seal; and that it would be the most injurious notion, and even a reflection on the common law, to suppose it so defective as not to provide a remedy against offences of this nature.

The King v. Ward, Mich. 12 Geo. 1; Barnard. K. B. 10; 2 Ld. Raym. 1461; 2 Str. 747.

||Where the defendant having been committed to jail, under an attachment for a contempt in a civil cause, counterfeited a discharge as from his creditor to the jailer, under which he obtained his discharge; it was holden a misdemeanor at common law, although as the attachment was not for non-payment of money, the authority was a mere nullity, and no warrant to the

(C) What Offences made Forgery by the Statute.

jailer; a majority of the judges also thought that it was a forgery at common law.

Fawcett's Ca., 2 East, P. C. 862; and see Wilcox's Case, Russ. & Ry. 50.

(C) What Offences of this Kind are made Forgery by the Statute, and of the Punishment to be inflicted on Persons guilty of Forgery.

By the 5 Eliz. c. 14, it is enacted, "That if any person or persons, upon his or their own head and imagination, or by false conspiracy and fraud with others, shall wittingly, subtilly, and falsely forge or make, or subtilly cause, or wittingly assent, to be forged or made, any false deed, charter or writing sealed, court-roll, or the will of any person or persons in writing, to the intent that the estate of freehold or inheritance of any person or persons, of, in, or to any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or interest of any person or persons, of, in, or to the same, or any of them, shall or may be molested, troubled, defeated, recovered, or charged, or shall pronounce, publish, or show forth in evidence, any such false and forged deed, charter, writing, court-roll, or will as true, knowing the same to be false and forged, as is aforesaid, to the intent above remembered, and shall be thereof convicted either upon action or actions of forger of false deeds, to be founded upon this statute, at the suit of the said party grieved or otherwise, according to the order and due course of the laws of this realm, &c., he shall pay unto the party grieved his double costs and damages, to be found or assessed in that court where such conviction shall be; and also shall be set upon the pillory in some open market-town, or other open place, and there have both his ears cut off, also his nostrils to be slit and cut, and seared with a hot iron, &c., and shall forfeit to the king the whole issues and profits of his lands and tenements during his life, and suffer perpetual imprisonment during his life."

And by § 3, it is enacted, "That if any person or persons, upon his or their own head or imagination, or by false conspiracy or fraud had with any other, shall wittingly, subtilly, and falsely forge or make, or wittingly, subtilly, and falsely cause or assent to be made and forged, any false charter, deed, or writing, to the intent that any person or persons shall or may have or claim any estate or interest for term of years, of, in, or to any manors, lands, tenements, or hereditaments, not being copyhold, or any annuity in fee-simple, fee-tail, or for term of life, lives, or years; or shall, as is aforesaid, forge, make, or cause, or assent to be made or forged, any obligation or bill obligatory, or any acquittance, release or other discharge of any debt, account, action, suit, demand, or other thing personal, or shall pronounce, publish, or give in evidence, except as is before excepted, any such false or forged charter, deed, writing, obligation, bill obligatory, acquittance, release, or discharge as true, knowing the same to be false and forged, and shall be thereof convicted by any of the ways and means aforesaid, he shall pay unto the party grieved his double costs and damages, to be found and assessed in such court where the said conviction shall be had, and shall be also set upon the pillory in some open market town, or other open place, and there have one of his ears cut off, and also shall suffer imprisonment for one year," &c.

And by § 7, it is further enacted, "That if any person or persons, being convicted or condemned of any of the offences aforesaid, by any the ways and means above limited, shall, after any such his or their conviction or condemnation afterwards commit or perpetrate any of the said offences in form

(C) What Offences made Forgery by the Statute.

aforesaid, that then every such second offence or offences shall be adjudged felony, and the parties being thereof convicted or attainted according to the laws of this realm, shall suffer such pains of death, loss, and forfeiture of their goods, chattels, lands, and tenements, as in cases of felony by the common laws of this realm ought to be lost or forfeited, without having any advantage or benefit of clergy or sanctuary: saving to every person and persons, bodies politic and corporate, their heirs and successors, other than the said offenders, and such as claim to their uses, all such rights, titles, interests, possessions, liberties of distresses, leases, rents, reversions, offices, and other profits and advantages, which they or any of them shall have at the time of such conviction or attainder, of, in, or to any the lands, tenements, or hereditaments of any such persons so as is aforesaid convicted or attainted, or at any time before in as large and as ample manner to all intents and purposes, as if this act had never been made."

By § 8, "Any such conviction or attainder of felony as is aforesaid, or any forfeiture by reason of the same, shall not in any wise extend to take away the dower of the wife of any such person attainted, nor to the corruption of blood, or disherison of any the heir or heirs of any such person or persons so attainted."

In the construction of this statute the following points have been holden :

1. That a false customary of a copyhold manor made in parchment, under the seals of several tenants of the manor, and containing in it divers false customs, apparently tending to the disherison of the lord, and falsely pretending by its title to be set forth by the consent of all the tenants and allowance of the lord, is within the first branch of the forgery mentioned in the statute, as being a sealed writing made to the intent to molest the inheritance of the lord.

Dyer, 322, pl. 26; 3 Leon. 108; Hawk. P. C. c. 70. § 17.

2. That the forgery of a lease for years, or of a grant of a rent-charge for years, in the name of one who is seised of a freehold or inheritance, is also within the said first branch of the statute, because the said branch is penned in general words, extending to any molestation whatsoever of such estate, without mentioning any estate or interest, in the claim whereof such molestation shall consist; and from this ground it follows, that these words in the second branch of forgery mentioned in the statute, *to the intent that any person shall claim any estate or interest for term of years, &c.* are meant only of such forgeries as relate to such an estate or interest *in esse* before.

3 Inst. 170; Noy, 42; Hawk. P. C. c. 70, § 18.

3. That the forgery of a will in writing of one possessed of such an estate, mentioning a bequest thereof, is within the said second branch of the statute, as being a false writing, made to the intent that some person may claim an estate for years; notwithstanding the said branch makes no express mention of a will, as the first doth.

Dyer, 302, pl. 43; Hawk. P. C. c. 70, § 19.

4. That the forgery of a lease of lands in Ireland is not within either of the branches of the statute.

3 Leon. 170.

5. That the forgery of a deed, containing a gift of mere personal chattels, is also no way within the statute, the words whereof to this purpose are, *If any person shall forge any obligation, or bill obligatory, or any acquit-*

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*tance, release, or other discharge of any debt, account, action, suit, demand, or other thing personal.*

3 Leon. 170; Hawk. P. C. c. 70, § 21.

6. That the forgery of a statute-merchant, or of a recognisance in the nature of a statute-staple, by acknowledging them in the name of another, are within the statute, as being obligations, because they must have the seal of the party, by the express words of the statute, which appoint in what manner such statute or recognisance shall be taken; but that the forgery of the statute-staple is no way within the statute, because it needeth not the seal of the party, but only the seal of the staple provided for it.

15 H. 7, 15 a; 2 Ro. Abr. 466; Hawk. P. C. c. 70, § 22; 3 Inst. 171, *contr.*

7. That he, who is truly informed by another that a deed is forged, is in danger of the statute, if he afterwards publish the same to be true, for the words of the statute are, *If any one shall publish, &c., such false and forged deed, &c., knowing the same to be false and forged.*

3 Inst. 171; Hawk. P. C. c. 70, § 23.

8. That the double damages to be awarded to the party grieved by a forged release of an obligation, &c. shall be governed by the penalty, and not by the true debt appearing in the condition.

3 Inst. 172; Hawk. P. C. c. 70, § 24.

9. That one, who hath been convicted of publishing a forged deed, may become guilty of felony by forging another deed afterwards, as well as by publishing any such deed, notwithstanding the second offence be not of the very same nature with the first; for the words of the statute are, *If any person being convicted or condemned of any of the offences aforesaid, &c., shall after any such conviction or condemnation afterwards commit any of the said offences.*

3 Inst. 171; Hawk. P. C. c. 70, § 25.

10. That notwithstanding it be necessary, in every prosecution upon the statute, strictly to pursue the very words of it; (for which cause it hath been resolved, that an indictment, setting forth the forgery of a writing indented, without adding that it was sealed, is insufficient;) yet there was no necessity that the translation of the words of the statute should be in proper classical *Latin*, so that it were intelligible; and upon this ground it hath been adjudged, that an indictment setting forth, that the defendant *super caput suum proprium* did forge, &c., meaning thereby to express that he did it of his own head, is sufficient.

3 Keb. 356, 367; 3 Inst. 369; Keb. 849; 2 Keb. 129; 2 Lev. 221; Vent. 23, 24; Salk. 376; Hawk. P. C. c. 70, § 26.

11. That upon an indictment of trespass, forgery, and publication of a deed, a verdict finding the defendant guilty *de transgressionem et forgeria predictis, prout superius in indictmento supponitur*, is sufficient, because these words *de transgressionem predictis* include the whole; also, perhaps such a verdict may be sufficient for another reason, because the offence is equally within the statute, and the punishment the very same, whether the party be guilty both of the forgery and publication, or of one of them only.

2 Lev. 111, 221; 3 Keb. 353; Hawk. P. C. c. 70, § 27.

12. That if the conveyance be defective, so as not to pass the thing intended to be conveyed, yet it is within the act; as, where to an indictment of forgery the error assigned was of a deed enrolled, and the acknowledg-

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ment laid eleven months after the enrolment; and it being objected, that it being of a bargain and sale it could have no force, nor be any way binding to the party without the acknowledgment; the court held, that admitting the acknowledgment essential, so that the enrolment was not good, unless that appeared, (which they seemed to deny,) yet that it was within the statute; and that though there be a flaw in the conveyance forged, which counsel learned may espy and avoid, yet the party may be impeached, molested, and troubled by such deed, which makes it within the statute.

Keb. 707, 742, 803. 848; *The King v. Ring, and Pasch.* 4 Geo. 2, S. P. determined between *The King and Croke*, 2 Stra. 901; *Barnard.* K. B. 168, 441 451 (B).

By the 2 Geo. 2, c. 25, reciting, that the laws already in force were not effectual for preventing the abominable crimes of forgery, it is enacted, "That if any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging, or counterfeiting, any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, endorsement or assignment of any bill of exchange, or promissory note for payment of money, or any acquittance or receipt either for money or goods, with intention to defraud any person, (or corporation,) (a) or shall utter or publish as true, any false, forged, or counterfeited deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, endorsement or assignment of any bill of exchange or promissory note for payment of money, acquittance or receipt, either for money or goods, with intention to defraud any person, (or corporation,) knowing the same to be false, forged, or counterfeited, then every such person, being thereof lawfully convicted according to the due course of law, shall be deemed guilty of felony, and suffer death as a felon, without benefit of clergy."

Made perpetual by 9 Geo. 2, c. 18, and vide 31 G. 2, c. 22, § 81; *Russell's case*, *Leach's Cases*, 8. (a) By st. 31 G. 2, c. 22, § 78.

Provided, § 5, "That no attainder for any offence hereby made felony, shall make or work any corruption of blood, loss of dower, or disherison of heirs."

And by the 7 Geo. 2, c. 22, reciting the last statute, and that the same doth not extend to the forging of any acceptance of any bill of exchange, &c., it is enacted, "That if any person shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or other security for payment of money or delivery of goods, with intention to defraud any person whatsoever, or shall utter or publish as true, any false, altered, forged, or counterfeited acceptance of any bill of exchange, or accountable receipt for any note, bill, or other security for payment of money, or warrant or order for payment of money, or delivery of goods, with intention to defraud any person, knowing the same to be false, altered, forged, or counterfeited; then every such person being thereof lawfully convicted, according to the due course of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy."

By 45 G. 3, c. 89, entitled, "An act to alter and extend the provisions of the laws now in force for the punishment of the forgery of bank notes, bills of exchange, and other securities, to every part of Great Britain," "if any person or persons shall falsely make, forge, counterfeit, or alter, or cause

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or procure to be falsely made, forged, counterfeited, or altered, or willingly act or assist in the false making, forging, counterfeiting, or altering any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, endorsement or assignment of any bill of exchange or promissory note for payment of money, acceptance of any bill of exchange, or any acquittance or receipt either for money or goods, or any accountable receipt for any note, bill, or other security for payment of money, or any warrant or order for payment of money or delivery of goods, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever; or shall offer, dispose of, or put away any false, forged, counterfeited, or altered deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, endorsement or assignment of any bill of exchange or promissory note for payment of money, acceptance of any bill of exchange, acquittance, or receipt, either for money or goods, accountable receipt for any note, bill, or other security for payment of money, warrant or order for payment of money or delivery of goods, with intention to defraud any person or persons, body or bodies politic or corporate, knowing the same to be false, forged, counterfeited, or altered, then every person or persons so offending, and being thereof lawfully convicted according to the due course of law, shall be deemed guilty of felony, and shall suffer death as a felon without benefit of clergy."

By § 2. "If any person or persons shall forge, counterfeit, or alter any bank note, bank bill of exchange, dividend warrant, or any bond or obligation under the common seal of the governor and company of the bank of England, or any endorsement thereon, or shall offer or dispose of or put away any such forged, counterfeit, or altered note, bill, dividend warrant, bond, or obligation, or the endorsement thereon, or demand the money, therein contained or pretended to be due thereon, or any part thereof, of the said company, or any of their officers or servants, knowing such note, bill, dividend warrant, bond, or obligation, or the endorsement thereon, to be forged, counterfeited, or altered, with intent to defraud the said governor and company, or their successors, or any other person or persons, body or bodies politic or corporate whatsoever, every person or persons so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon without benefit of clergy."

§ 3. "If any person or persons (other than the officers, workmen, servants, or agents for the time being of the governor and company of the Bank of England, to be authorized and appointed for that purpose by the said governor and company and for the use of the said governor and company only) shall make or use, or cause or procure to be made or used, or knowingly aid or assist in the making or using, or without being authorized or appointed as aforesaid shall knowingly have in his, her, or their custody or possession without lawful excuse, (the proof whereof shall lie upon the party accused,) any frame, mould, or instrument for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, visible in the substance of such paper; or shall manufacture, make, use, vend, expose to sale, publish, or dispose of, or cause or procure to be manufactured, made, used, vended, exposed to sale, published, or disposed of, or aid or assist in the manufacturing, making, using, vending, exposing to sale, publishing, or disposing of, or without being authorized or appointed as aforesaid shall knowingly have in his, her,

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or their custody or possession, any paper whatsoever with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or having any number, sum, or amount expressed in a word or words in Roman letters appearing visible in the substance of such paper; or if any person or persons (except as before excepted) shall, by any art, mystery, or contrivance, cause or procure the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words to appear visible in the substance of the paper whereon the same shall be written or printed, or shall knowingly aid or assist in causing the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters to appear visible in the substance of the paper whereon the same shall be written or printed, every person or persons so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years."

§ 4. "Provided that nothing herein contained shall extend, or be construed to extend, to restrain any person or persons from issuing or negotiating any bill or bills of exchange, promissory note or promissory notes, having the sum or amount thereof expressed in guineas, or in a numerical figure or figures, denominating the sum or amount thereof in pounds sterling, appearing visible on the substance of the paper upon which the same shall be written or printed: any thing herein contained to the contrary thereof in anywise notwithstanding."

§ 5. "Provided that nothing in this act contained shall restrain or prevent any person or persons from making, using, vending, exposing to sale, publishing, or disposing of any paper having waving or curved lines, or any other devices in the nature of watermarks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not contrived in such manner as to form the groundwork or texture of the paper, or to imitate or resemble the waving or curved laying wire lines or bar lines of the said paper of the governor and company of the Bank of England, or to imitate or resemble the watermarks used by the governor and company of the Bank of England, in the bank notes, bank bills of exchange, and bank post bills, issued by the said governor and company; any thing herein contained to the contrary thereof in any wise notwithstanding."

§ 6. "If any person or persons shall purchase or receive from any other person or persons any forged or counterfeited bank note, bank bill of exchange, bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged or counterfeited, or shall knowingly or wittingly have in his, her, or their possession or custody, or in his, her, or their dwelling-house, outhouse, lodgings, or apartments, any forged or counterfeited bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged or counterfeited without lawful excuse, (the proof whereof shall lie upon the person accused,) every person or persons so offending, and being thereof convicted according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years."

§ 7. "If any person or persons shall engrave, cut, etch, scrape, or by any other means or device make, or shall cause or procure to be engraved, cut, etched, scraped, or by any other means or device made, or shall knowingly

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aid or assist in the engraving, cutting, etching, scraping, or by any other means or device, making, in or upon any plate of copper, brass, steel, pewter, or of any other metal or mixture of metals, or upon any wood or any other materials, or any plate whatsoever, any bank note, bank bill of exchange, bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, purporting to be the note, or bill of exchange, or bank post bill, or blank bank note, or blank bank bill of exchange, or blank bank post bill, or part of the note, or bill of exchange, or bank post bill of the governor and company of the Bank of England, without an authority in writing for that purpose from the said governor and company of the Bank of England; or shall use any such plate so engraved, cut, etched, scraped, or by any other means or device made, or shall use any other instrument or device for the making or printing any such bank note, bank bill of exchange, or bank post bill, or blank bank note, or blank bank bill of exchange, or blank bank post bill, or part of a bank note, or bank bill of exchange, or bank post bill, without such authority in writing as aforesaid; or if any person or persons shall, from and after the passing of this act, without such authority as aforesaid, knowingly have in his, her, or their custody, any such plate, instrument, or device, or shall, without such authority as aforesaid, knowingly and wilfully utter, publish, dispose of, or put away any such (a) blank bank note, blank bank bill of exchange, or blank bank post bill, or part of such bank note, bank bill of exchange, or bank post bill, every person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years."

(a) Bank note, bank bill of exchange, bank post bill; these words are in the 41 G. 3, and seem omitted here by accident.

§ 8. "All and every the clauses and provisions in this act contained shall extend, and be deemed and construed to extend, by all courts, judges, and magistrates whatsoever, to every part of Great Britain; any thing hereinbefore contained, or any law, statute, or usage to the contrary notwithstanding."

By 52 Geo. 3, c. 138, § 5, reciting, that "divers frauds had been practised by making and publishing papers with certain words and characters so nearly resembling the notes and bills of the governor and company of the Bank of England, as to appear to ignorant and unwary persons to be the notes or bills of the said governor and company; for prevention thereof it is enacted, that if any person shall engrave, cut, etch, scrape, or by any other means or device make, or shall cause or procure to be engraved, cut, etched, scraped, or by any other means or device made, or shall knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other means or device making, in or upon any plate of copper, brass, steel, pewter, or of any other metal or mixture of metals, or upon wood or any other materials, or upon any plate whatsoever, any word or words, figure or figures, character or characters, the impression taken from which shall resemble or be apparently intended to resemble the whole or any part of any of the notes or bills of the said governor and company commonly called bank notes and bank post bills, or shall contain any word, number, figure, or character in white on a black, sable, or dark ground, without an authority in writing for that purpose from the said governor and company, to be produced and proved by the party accused, or shall without such authority as aforesaid use



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any such plate, wood, or other material so engraved, cut, etched, scraped, or by any other means or device made, or shall use any other instrument or device for the making or printing upon any paper or other material, any word or words, figure or figures, character or characters, which shall be apparently intended to resemble the whole or any part of any of the said notes or bills of the said governor and company, or any word, number, figure, or character in white on a black, sable, or dark ground; or if any person or persons shall, without such authority as aforesaid, knowingly have in his, her, or their custody, any such plate, instrument or device, or shall knowingly and wilfully utter, publish, or dispose of or put away any paper, or other material containing any such word or words, figure or figures, character or characters as aforesaid, or shall knowingly or wittingly have in his, her, or their custody or possession, any paper or other material containing any such word or words, figure or figures, character or characters as aforesaid, without lawful excuse, (the proof whereof shall lie upon the person accused,) every person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years."

¶ These, I believe, are all the general statutes upon the subject. For the particular ones, I refer the reader to the Index to the Statutes, or rather to that happy arrangement of them which we owe to the industry and ability of Mr. Evans.¶

¶ Forgery may be committed of an instrument on unstamped paper, on the principle that it is not material that the forged instrument should be so made, that if true it would be valid.

Hawkswood's Ca., 1 Leach, 257; and see *Rex v. Lyon*, Russ. & Ry. 255; and see *Collecott's Ca.*, 4 Taunt. 300; Russ. & Ry. 212, 229.

So, forgery may be committed in endorsing a bill in another's name, though there is no endorsement in the name of the payee, and consequently the bill is not properly negotiable.

*Rex v. Wicks*, Russ. & Ry. 149; and see *Rex v. Cartright*, Russ. & Ry. 106.

But if the name of the payee be omitted altogether in the bill, it cannot be a forgery.

*Rex v. Richards*, Russ. & Ry. 193; and see *Rex v. Randall*, Russ. & Ry. 195.

So also if the note fabricated be incomplete by wanting a signature.

*Rex v. Pateman*, Russ. & Ry. 455; and see *Rex v. Burke*, Ibid. 496.

So if a fabricated will of land be attested by only two witnesses, it is not forgery, unless it appear that the supposed testator had only a chattel interest.

*Wall's Ca.*, 2 East, P. C. 953.

By 9 G. 4, c. 32, § 2, a great anomaly in the law of evidence is removed, and the party whose name is forged is made a competent witness on a prosecution for forging an instrument.

Respecting forgery of instruments relating to the public funds and stocks, see *Russ. on Cri.* (2d edit.) b. iv. c. 34; respecting bank securities, Ibid. c. 35; respecting other public companies, Ibid. c. 36; respecting forging stamps, Ibid. c. 37; respecting forgery of official papers, Ibid. c. 38; and see the provisions on these points in 1 W. 4, c. 66.

A power of attorney to transfer stock signed, sealed, and delivered, is a deed within the meaning of the 2 G. 2, c. 25.

*Rex v. Fauntleroy*, Ry. & Moo. 52.

A bill drawn upon the commissioners of the navy, is a bill of exchange within the 2 G. 2, c. 25.

*Chisholm's Ca.*, Russ. & Ry. 297.

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A fabricated promissory note payable to two ladies, stewardesses to a provident institution, and their successors, was held a forgery within the 2 G. 2, c. 25; for it is not necessary that the note should be negotiable, and the payees might have sued on it.

Rex v. Box, 6 Taunt. 325; Russ. & Ry. 300.

A memorandum importing that A had paid money to B, but not any acknowledgment of B having received it, was holden not a *receipt* within 2 G. 2, c. 25.

Rex v. Harvey, Russ. & Ry. 227.

A forged order for the purpose of obtaining a reward for the apprehension of a vagrant under the 17 G. 2, c. 5, was holden not within the forgery statute 7 G. 2, c. 22, it being deficient in the requisites prescribed by the 17 G. 2, c. 5, which authorizes it to be made.

Rushworth's Ca., Russ. & Ry. 317; and see Froud's Ca., Ibid. 389, as to an order on the treasurer of a county under 48 G. 3, c. 75. As to the offence of fabricating the printed forms and paper used for banker's securities, see 1 W. 4, c. 66, §§ 17, 18; and as to engraving plates or printing foreign bills of exchange without authority, see 43 G. 3, c. 56, § 1; Russ. on Cri. bk. iv. c. 39, and 1 W. 4, c. 66, § 19.

By 1 W. 4, c. 66, the statutes 5 Eliz. c. 14, 2 G. 2, c. 25, (except sec. 2,) the 7 G. 2, c. 22, the 45 G. 3, c. 89, and all the principal statutes respecting forgery are repealed from the 20th July, 1830, except as far as any of the said acts repeal any other acts, and except as to the offences committed before or upon the 20th July, 1830, which are to be dealt with as if this act had not been passed.

By 1 W. 4, c. 66, 1, § 1, reciting that several offences relating to forged writings, and to other forged and counterfeit matters, and to false personation, false oaths, false entries, and other false matter, are now by virtue of several statutes punishable with death: and that it is expedient that none of those offences shall hereafter be punishable with death, unless the same shall be made punishable with death by this act, and also that the statutes concerning such of those offences whether punishable with death or otherwise, as may frequently or seriously affect the interest of his majesty or his subjects, should be amended and consolidated into this act; it is enacted, "That where by any acts now in force, any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to be falsely made, forged, counterfeited, erased or altered, or any person demanding or endeavouring to receive or have any thing, or to do or cause to be done any act, upon or by virtue of any matter whatsoever, knowing such matter to be falsely made, forged, counterfeited, erased or altered, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; or where by any acts now in force any person falsely personating another, or falsely acknowledging anything in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity or fund, in the name of any person not being the owner thereof, or knowingly taking a false oath, or knowingly making a false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have

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been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; or where by any acts now in force, any person making or using, or knowingly having in his custody or possession, any frame, mould, or instrument for making of paper with certain words visible in the substance thereof, or any persons making such paper, or causing certain words to appear visible in the substance of any paper, would according to the provisions contained in any of the said acts, be guilty of felony and liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall, after the commencement of this act be convicted of any such felony, as is hereinbefore mentioned, or of aiding, abetting, counselling or procuring the commission thereof, such person shall not suffer death for the same unless the same shall be made punishable with death by this act; and if the same shall not be made punishable with death by this act, in such case every person who shall, after the commencement of this act, be convicted of any such felony, or of aiding, abetting, counselling or procuring the commission thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years; provided always that nothing herein contained shall affect or alter any acts relating to the coin of this realm, or to any coin of any other realm lawfully current in this realm.

“§ 2. And be it enacted, that if any person shall forge or counterfeit, or shall utter knowing the same to be forged or counterfeited, the great seal of the united kingdom, his majesty's privy seal, any privy signet of his majesty, his majesty's royal sign manual, any of his majesty's seals appointed by the twenty-fourth article of the union to be kept, used and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, every such offender shall be guilty of high treason, and shall suffer death accordingly: provided always, that nothing contained in an act passed in the seventh year of the reign of King William the Third, intituled *An Act for regulating of trials in cases of treason and misprision of treason*; or in an act passed in the seventh year of the reign of Queen Anne, intituled *An Act for improving the union of the two kingdoms*, shall extend to any indictment, or to any proceedings hereupon, for any of the treasons hereinbefore mentioned.

“§ 3. And be it enacted, that if any person shall forge or alter, or shall offer, utter, dispose of or put off, knowing the same to be forged or altered, any exchequer bill or exchequer debenture, or any endorsement on or assignment of any exchequer bill or exchequer debenture, or any bond under the common seal of the united company of merchants of England, trading to the East Indies, commonly called an East India bond, or any endorsement on or assignment of any East India bond, or any note or bill of exchange of the governor and company of the Bank of England, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any endorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, or any will, testament, codicil, or testamentary writing, or any bill of exchange, or any promissory note for the payment of money, or any endorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, with in-

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tent in any of the cases aforesaid, to defraud, any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

“§ 4. And be it declared and enacted, that where by any act now in force any person is made liable to the punishment of death for forging or altering, or for offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any instrument or writing designated in such act by any special name or description, and such instrument or writing, however designated, is in law a will, testament, codicil or testamentary writing, or a bill of exchange, or a promissory note for the payment of money, or an endorsement on or assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant or order for the payment of money, within the true intent and meaning of this act, in every such case the person forging or altering such instrument or writing, or offering, uttering, disposing of or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this act, and punished with death accordingly.

§ 5. “And be it enacted, that if any person shall wilfully make any false entry in, or wilfully alter any word or figure in any the books of account kept by the governor and company of the Bank of England, or by the governor and company of merchants of Great Britain trading to the South Seas and other parts of America, and for encouraging the fishery, commonly called the South Sea Company, in which books the accounts of the owners of any stock, annuities, or other public funds which now are or hereafter may be transferable at the Bank of England or at the South Sea House shall be entered and kept, or shall in any manner wilfully falsify the accounts of such owners in any of the said books, with intent in any of the cases aforesaid to defraud any person whatsoever; or if any person shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or the South Sea House, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon.

§ 6. “And be it enacted, that if any person shall forge or alter, or shall utter, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity or other public fund which now is or hereafter may be transferable at the Bank of England or at the South Sea House, or of or in the capital stock of any body corporate, company or society which now is or hereafter may be established by charter or act of parliament, or shall forge or alter, or shall utter, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, or public fund, or capital stock as is hereinbefore mentioned, or to receive any dividend payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent in any of the several cases aforesaid, to defraud any person whatsoever; or if any person shall falsely and deceitfully personate any owner of any such share, interest, or dividend as aforesaid, and thereby transfer any share or

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interest belonging to such owner, or thereby receive any money due to such owner, as if such persons were the true and lawful owner; every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon."

§ 7. "And be it enacted, that if any person shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity or other public fund, which now is or hereafter may be transferable at the Bank of England, or at the South Sea House, or any owner of any share or interest of or in the capital stock of any body corporate, company or society which now is or hereafter may be established by charter or act of parliament, or any owner of any dividend payable in respect of any such share or interest as aforesaid, and shall thereby endeavour to transfer any share or interest belonging to any such owner, or thereby endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner; every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned any term not exceeding four years, nor less than two years."

§ 8. "And be it enacted, that if any person shall forge the name or handwriting of any person, as or purporting to be a witness attesting the execution of any power of attorney or other authority, to transfer any share or interest of or in any such stock, annuity, public fund or capital stock, as is hereinbefore mentioned, or to receive any dividend payable in respect of any such share or interest, or shall utter any such power of attorney or other authority, with the name or handwriting of any person forged thereon as an attesting witness, knowing the same to be forged, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year."

§ 9. "And be it enacted, that if any clerk, officer, or servant of, or other person employed or intrusted by the governor and company of the Bank of England, or the governor and company of merchants commonly called the South Sea Company, shall knowingly make out or deliver any dividend warrant for a greater or less amount than the person or persons on whose behalf such dividend warrant shall be made out is or are entitled to, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year."

§ 10. "And be it enacted, that if any person shall forge or alter, or shall offer, utter, dispose of or put off, knowing the same to be forged or altered, any deed, bond or writing obligatory, or any court roll or copy of any court roll relating to any copyhold or customary estate, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for the payment of money, or any warrant, order or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, or less than two years."

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§ 11. "And be it enacted, that if any person shall, before any court, judge, or other person lawfully authorized to take any recognisance or bail, acknowledge any recognisance or bail in the name of any other person not privy or consenting to the same, whether such recognisance or bail in either case be or be not filed, or if any person shall, in the name of any other person not privy or consenting to the same, acknowledge any fine, recovery, *cognovit actionem*, or judgment, or any deed to be enrolled; every such offender shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years."

§ 12. "And be it enacted, that if any person shall without lawful excuse, the proof whereof shall lie upon the party accused, purchase or receive from any other person, or have in his custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same respectively to be forged, every such offender shall be guilty of felony, and being convicted thereof, shall be transported beyond the seas for the term of fourteen years.

§ 28. "And be it declared and enacted, that where the having any matter in the custody or possession of any person, is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field or other place open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use, or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act; and where the committing any offence with intent to defraud any person whatsoever, is made punishable by this act, in every such case the word "person" shall throughout this act be deemed to include his majesty or any foreign prince or state, or any body corporate, or any company or society of persons not incorporated, or any person or number of persons whatsoever who may be intended to be defrauded by such offence, whether such body corporate, company, society, person or number of persons, shall reside or carry on business in England or elsewhere, in any place or country, whether under dominion of his majesty or not; and it shall be sufficient in any indictment to name one person only of such company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case may be." (For further provisions see the act.)||

[A man may be guilty of forgery, though the person whose name or signature he purports to forge be not in existence. As, if a person alter his own name endorsed on a bill of exchange to the name of a person beginning with the same initial, although there is no known person in existence answering to the name forged. So, where a person in possession of a promissory note, which had been lost, endorses it in a fictitious name in order to get it discounted. Upon the same principle a man may be indicted for forging a *last* will and testament, although the supposed testator be alive.

Fost. 116, Bolland's case; Leach's Cases, 78; R. v. Tuft, Leicester Lent Ass. 1776 R. v. Cogan, Leach, 356.

If a bill of exchange payable to A or order get into the hands of another

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person of the same name with the payee, and such person knowing that he is not the person in whose favour it was drawn, endorse it, he is guilty of forgery.

Mead v. Young, 4 T. R. 28.]

|| If a person authorize another to sign a note in his name, dated at a *particular place*, and made payable at a *banker's*, and the person in whose name it is drawn represent it to be the name of *another person*, with intent to defraud, and no such person, as the note and representation import, exist, this is forgery.

R. v. Parkes, 2 Leach's Ca. 775.||

[A forged draught on a banker is an order for the payment of money within the 7 Geo. 2, although no person of the name forged ever kept cash there.

Locket's case, Leach, 89 ;  $\beta$  The People v. Howell, 4 Johns. 296.g

To forge a note in imitation of a bank note, although there be no watermark, and the word *pounds* be omitted, is a capital offence.

Elliot's case, Leach, 162.

An entry of the receipt of money or notes made by a cashier of the Bank of England in the bank book of a creditor, is an accountable receipt for the payment of money within 7 Geo. 2, and altering the principal sum by prefixing a figure to increase its numeration, is a capital forgery.

Harrison's case, Leach, 166.

|| A forgery, with intent to defraud "*the stewards of the feast of the Sons of the Clergy*" is within the above statutes, although it be to the injury of a private society, and those statutes apply expressly only to the defrauding of *individuals* and *corporate bodies*.

R. v. Jones and Palmer, Leach's Ca. 366.

A promissory note in the following words, "On demand, we promise to pay Mesdames Sarah Wallis and Sarah Doubtfire, stewardesses for the time being of the Provident Daughters' Society, held at Mr. Pope's, the Hope, Smithfield, or their successors in office, sixty-four pounds, with 5 *per cent.* interest for the same ; value received this 7th day of February 1815. For Felix Calvert and Co., John Foster," was holden to be a valid promissory note within the statute of 2 G. 2, and capable of being the subject of forgery. It is not necessary that such a note should be in itself negotiable ; it is sufficient that it should be a note for the certain payment of a sum of money, whether negotiable or not. And though, as it was objected, these payees were not at the time legally stewardesses, yet it was a description by which they were then known ; and though they could not legally have successors in office, yet, in case of their decease, their executors and administrators might sue, and they themselves, during their life, might recover on it.

R. v. Box, 6 Taunt. 325.||

A forged order for the delivery of goods, to be within 7 Geo. 2, must be positive and compulsory. It must likewise be directed to the person who holds the goods, and it must appear upon the indictment that the person whose name is charged to be forged, had an authority to make such order, as the forged order purports to be.

Leach, 108, 266 ; Clinch's case, Ibid. 437 ; Fost. 120.

Where an indictment stated that the instrument forged "*purported to be a bank note*," but, in fact, it was very different and distinguishable

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from that security; the court held that the defect could not be supplied, so as to support the indictment, by any representations of the party at the time he uttered it.

R. v. Jones, Dougl. 300.]

|| An indictment charging that the defendant, having in his possession a bill of exchange *purporting* to be directed to one J. King, by the name and description of J. Ring, forged the acceptance of the said J. King, is bad; because *purport* means what appears on the face of the instrument, and the bill did not purport to be drawn on J. King.

R. v. Reading, 1 East, 186, note; R. v. Gilchrist, Ibid. S. P.

So, where the indictment charged that the bill *purported* to be directed to Richard Down, Henry Thornton, John Freer, and John Cornwall, jun., by the name and description of Messrs. Down, Thornton, and Co.

R. v. Esdall, 1 East, 186.

The indictment must set out the forged instruments in words and figures.

R. v. Mason, 1 East, 186; R. v. Lyon, 2 Leach's Ca. 597.  $\beta$  In a case a variance from the description in the letter, viz. *guards curbs* for *guard curbs*, was held to be immaterial. Reg. v. Robson, 9 C. & P. 423.*g*

But upon an indictment for publishing a forged *receipt for money*, with the name Stephen Withers, &c., for the sum of 1*l.* 4*s.*, it was holden sufficient to set forth only the receipt itself, as follows; "18th March, 1773. Received the contents above, by me Stephen Withers," without setting forth the account itself to which such receipt referred, and at the foot of which it was subscribed; the account being only evidence to make out the charge.

R. v. Testick, 1 East, 186.  $\beta$  Forging an order in these words: "Pay to John Low, or bearer, \$1500, in N. Myers' bills or yours," is not within the New York act to prevent forgeries, it not being an order for the payment of money or the delivery of goods. The People v. Farrington, 14 Johns. 348.*g*

The name of the holder of a navy bill, signed on a proper receipt-stamp, and affixed to the navy bill, does not itself purport to be a receipt for money within the above statutes of 2 G. 2, & 7 G. 2; but, as the money is paid on such signature, and it has always been considered as a receipt at the Navy Office, it may, by proper averments, be brought within those statutes, as a receipt for money.

R. v. Hunter, 2 Leach's Ca. 624.

So, upon the authority of the last case, an indictment for forging the word "settled," at the bottom of a bill of parcels, importing that the bill had been paid, was holden to be bad, because it did not show, by proper averments, that the word "settled" purported to be a receipt; although the stamp-act 35 G. 3, c. 55, § 7, enacts, that every writing or memorandum denoting that a debt has been paid or *settled* shall be deemed a receipt.

R. v. Thompson, 2 Leach's Ca. 910.

But in the above case of R. v. Testick, the indictment was holden to be good, though it neither set out the account, nor made any averment.

See R. v. Taylor, 1 Leach's Ca. 215.

An indictment for forging a *transfer* of stock is good, although the stock had never been accepted by the person in whose name it stood, and although the transfer was not *witnessed* according to the rules and directions of the bank.

R. v. Gade, 2 Leach's Ca. 732.



(D) Of the Offence of uttering a forged Instrument.

Upon a prosecution for this crime the forged instrument may be given in evidence although it be not stamped.

R. v. Hawkeswood, 1 Leach's Ca. 257; R. v. Morton, Ibid. 258; R. v. Reculist, 2 Leach's Ca. 703.||

β (D) Of the Offence of uttering a forged Instrument.

β To utter is to offer or to publish. To utter and publish a counterfeit note, is to assert and declare, directly or indirectly, by words or actions, that the note offered is good. It is not necessary it should be passed in order to complete the offence of uttering.

Commonwealth v. Searle, 2 Binn. 338, 339; Bouv. L. D. h. t.; United States v. Mitchell, 1 Bald. 367.

It seems that reading out a document, although the party refuses to show it, is a sufficient uttering.

Jebb's Ir. Cr. Cas. 282; East, P. C. 179; 1 Mood. C. C. 166; Russ. & Ry. 113.

But the mere showing a forged instrument with a view to gain a credit, when there was no intention of passing it, it seems would not amount to an uttering.

Russ. & Ry. 200.

Where the prisoner was charged with uttering a forged bill, it appearing that the bill was not addressed to the drawee by name, but at a house of business, and having an acceptance forged on it; held to be properly described as a bill of exchange.

Reg. v. Hawkes, 2 Moody, 60.

When a person uttered a bill, all the names on which were fictitious, but not known to be so to the person to whom it was traded in payment of a debt, although it was believed that he intended to provide for it at maturity, held that the prisoner was properly convicted.

Reg. v. Hill, 2 Moody, 30.

Where the prisoner, on quitting the office of assistant overseer, delivered to his successor, among other vouchers, a paper in the usual form "£ for the high constable," signed J H, which had been altered to a larger sum; held to amount to uttering a false receipt with intent to defraud the high constable.

Regina v. Boardman, 2 Moody & R. 147.

The uttering and publishing a promissory note with forged endorsements upon it, is an offence within the New York statute against forgery, although the passing of the note is accompanied with communications which would have exonerated the endorsers had the endorsements been genuine; if by any possibility the supposed endorser could be injured, the crime is complete.

The People v. Rathbun, 20 Wend. 509.

The crime of uttering and publishing is not complete until the forged paper has been transferred and it comes to the hands or possession of some person other the criminal, his agent or servant.

The People v. Rathbun, 20 Wend. 509.

If an engraving of a forged note be given to a party as a pattern, or as a specimen of skill, the person giving it not intending that it shall be put in circulation, it is not an uttering within the statute.

Bex v. Harris, 7 C. & P. 428.g

## FORMEDON.

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FORMEDON is a real action which lies for the issue in tail after the death of his ancestor, or for him in remainder or reversion after the estate-tail determined, and is called *formedon*, because the writ comprehends the form of the gift.

Co. Lit. 326 a, 327; Booth, 139.

The proceedings in this action, as in all other real actions, being dilatory and expensive, it is now seldom brought; but as it is a proper remedy in many cases, and still in use, we shall consider it under the following heads.

(A) Of the several Writs of Formedon: And herein,

1. *Of the Formedon in Descender.*
2. *Of the Formedon in Remainder.*
3. *Of the Formedon in Reverter.*

(B) Of what Things a Formedon will lie.

(C) How the Demandant must set forth his Title.

(D) Of the Tenant's Plea in Abatement or Bar.

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(A) Of the several writs of Formedon: And herein,

1. *Of the Formedon in Descender.*

FORMEDON in the descender is an action *ancestrel droiturel*, which lies for the issue in tail, upon a violation of that right which descends to him from his ancestor, according to the form of the gift, and is in nature of a writ of right, being the (a) highest writ that an issue in tail can have.

2 Inst. 291; Plowd. 235; F. N. B. 212; L. Lit. § 595. (a) And therefore tenant in tail shall not have a writ of right *sur disclaimer*, nor a *quo jure*, nor a *ne injuste vexes*, nor *super obit*, nor *rationabili parte*, nor a *mortdancestor*, nor a *sur cui in vita*; for these and the like none but tenant in fee shall have. Co. Lit. 326 b.—But tenant in tail shall have a *quod permittat*, a writ of customs and services *in le debet et solet*, but not in the *debet* only; and in like manner he shall have a *secta ad molen-dinum in le debet et solet*, but not in the *debet* only; also he may have a writ of entry *in consimili casu*, and an admeasurement, and a *nativo habendo*, *cessavit*, *escheat*, *waste*, and the like. Co. Lit. 326 b.

This writ lay not at common law, but was given by Westm. 2, c. 1, the (b) form of which is set forth in the statute; for at common law all estates-tail were fee-simple conditional, and the donee, by having issue might have aliened the estate or forfeited it, in which cases the issue had no remedy; but, when by this statute, called the statute *de donis conditionalibus*, the donee was deprived of this power, it was also necessary that the issue should have a remedy against the alienation or discontinuance of his ancestor, and therefore the (c) formedon in descender was given.

Co. Lit. 21, 326 b; F. N. B. 212; L. And. 73; Plowd. 239 b; 6 Co. 40; Moore, 155; Vent. 299, and vide tit. *Estates-Tail*. (b) But though the form of the writ be set down, yet the statute need not be recited, nor any other statute which giveth the form of the writ. 2 Inst. 336. (c) That where the heir could not have an assize of *mortdancestor*, he might, according to his special case, have a formedon in descender at common law, but then he was to recover a fee-simple. Plowd. 239 b, *per* Bendlow; Co. Lit. 60 b.

(A) Of the several Writs of Formedon.

And therefore since this statute upon (a) every gift in tail of lands or tenements, if the ancestor alien the lands or tenements, or be disseised or deforced thereof, and die, he who is heir unto the lands, by force of the gift, shall have his formedon in descender against him who is tenant of the lands or tenements, or (b) pignor of the profits of the same.

F. N. B. 212, L. (a) That the demandant may have one formedon upon several gifts. Cro. Ja. 330, *per* Coke.—But, if A makes a gift of the manor of S to B and the heirs of his body, and afterwards by another deed gives sixty acres of land to B and the heirs of his body, upon the death of B without issue, A cannot have one formedon in reverter on these distinct gifts. 8 Co. 86. (b) But the writ against the pignor of the profits is given by the statute of 1 H. 7, c. 1.

So, if tenant in tail hath issue two daughters, and one of them hath issue a son, and dies, and the tenant in tail dieth, and a stranger abates, the surviving daughter and son shall have a formedon in descender.

F. N. B. 213, C.

So, if a man gives lands unto a woman, and unto the heirs which he himself shall beget on the body of the said woman, and they have issue between them two daughters, and one of them hath issue a daughter, and dies, and after the donor and donee die, the aunt and niece shall join in a formedon.

F. N. B. 213, E.

If tenant in tail hath issue two sons, and dies, and the eldest son enters and hath issue and dies, and the issue enters, and dies without issue, the youngest son of tenant in tail shall have his formedon in descender.

F. N. B. 213, D.

If tenant in tail hath several daughters, and after his death they enter and make partition, if one of the daughters after discontinues, and dies, leaving issue, such issue may have a formedon in descender.

F. N. B. 214, D; vide tit. *Coparceners*.

So, if two coparceners are tenants in tail by descent from their father or mother, and afterwards they make partition, and one coparcener hath issue and dies, and the other coparcener dies without issue, the issue shall have a formedon in descender for the whole land.

F. N. B. 214, C.

So, if lands in *gavelkind* be entailed, and descend to many brethren as heirs to their father, and they make partition betwixt them of the lands, and afterwards one aliens his part and dies, his heirs shall have a formedon of that which they held in parts.

F. N. B. 214, B.

If lands be given to two men, and to the heirs of the body of one of them, and he who hath the inheritance marries, and dies leaving issue, such issue may, after the death of him who hath the freehold, bring a formedon in descender against a stranger who abates, and allege the eplees in his father; for to such an intent the estate-tail was executed in the donee. But, in this case, it seems that the wife of the donee who had the inheritance in him shall not be endowed, because the estate-tail was not executed to all purposes in the husband.

Perk. § 334.

If tenant in tail discontinue in fee, and die, and the discontinuee make a lease for life, and grant the reversion to the issue, he shall not have a formedon against the tenant for life: for by his formedon he must recover an

(A) Of the several Writs of Formedon.

estate of inheritance, which the tenant for life hath not in him, but the issue in tail himself hath it.

Co. Lit. 297 b.

If in a formedon in descender the demandant is barred by verdict or on demurrer, yet his issue in tail shall have a new formedon on the construction of the statute Westm. 2. So, if he be barred of a writ of error by release of errors by his ancestor, yet he shall have a new writ of error; for he does not claim altogether as heir, but *per formam doni*; and by the statute he shall not be barred by the feint or false pleading of his ancestor (a), so long as the right of entail remains.

6 Co. 7 b. (a) That a bar in a formedon in descender is a good bar in any other formedon in descender brought upon the same gift. Co. Lit. 393 b.

## 2. Of the Formedon in Remainder.

This writ lies where a gift is made in tail or for life, remainder in tail or in fee, and the tenant in tail or for life aliens, or is disseised, and dieth without issue, he in remainder, or his representative, may bring his formedon in remainder.

Lit. § 597; F. N. B. 217, C. β In a formedon in remainder, the demandant claiming by devise, after the death of tenant for life, must set out the gift, the seisin of the first donee, his title to the land, and that on the death of the tenant for life, the right to the demanded premises remained in him. *Wells v. Prince*, 4 Mass. 64.g

This writ, as it lies for him in remainder after an estate-tail, is grounded upon the equity of the statute *de donis*; for a formedon in remainder did not lie upon an estate-tail at common law, because it was a fee-simple conditional, whereupon no remainder could be limited, because of the danger of a perpetuity, which was always against the policy of our law.

2 Inst. 536; Booth, 151.

But it seems by the better opinion, that a formedon in remainder lay after an estate for life; for this was an interest well known long before the statute *de donis*. Yet others doubt hereof, and think, that in this case it was given by the statute of Westm. 2, c. 24, made in the same year, by which it is provided, *Quod quotiescunque de cetero evenierit in cancell' quod in uno casu reperitur breve, in consimili casu cadente sub eodem jure et simili remedio indigente, concordent clerici de Canc. in brevi faciend.*, on which words it is clearly agreed the writ of entry *in consimili casu* is grounded, which is (b) a proper writ for him in reversion or remainder after an estate for life.

F. N. B. 217, D, 218, A; Booth, 151. (b) That at this day, if the tenant for life aliens, he in remainder seldom or never brings either his writ of entry *in consimili casu*, in the lifetime of the tenant for life, or his formedon after his death, or writ of entry *ad communem legem*, but enters for the forfeiture, and brings his ejectment. But, if the alienee of the tenant for life die seised before the entry of him in remainder or reversion, his entry in such case being taken away, this may be a proper remedy. Booth, 151, 151.

If lands be given to A for life, and the reversion be afterwards granted to be in tail, and after the death of A a stranger abate, B shall have a formedon in remainder, and not in the reverter.

F. N. B. 217, C; Dyer, 125.

If lands be given to the father and son, and to the heirs of their two bodies begotten, remainder over in fee, and the father die leaving only one son, who afterwards dies without issue, and a stranger abate, or the estate has been discontinued, he in remainder may have one formedon, and need not bring several writs.

Dyer, 143, 145.

(C) How the Demandant must set forth his Title.

If a remainder be once executed, that is to say, if the remainder-man be once seised of the estate-tail in possession, and the right descend to his heirs, the heir shall not have a formedon in remainder, but in the descender. As, if A give lands to B in tail, remainder to C in tail, B die without issue, C enter and alien in fee, and have issue D, D shall not have a formedon in remainder, because C, his father, was seised, and the right descended to him, but he shall have the general writ of formedon in descender.

F. N. B. 219, A; 8 Co. 89; Booth, 152.

### 3. Of the Formedon in Reverter.

This writ lies where the donee in tail or his issue die without issue, and a stranger abates, or they who were seised by force of the entail discontinued the same; in either of these cases, the donor or his heirs may have a formedon in reverter.

Lit. § 596; F. N. B. 219, E. Vide Dyer, 199, pl. 55, where he in reversion must bring his formedon, and cannot have a *scire facias* to execute a fine.

This writ lay at common law; for though at common law the estate-tail was a fee-simple conditional, so that by having issue, the donee by alienation, &c., might have barred the possibility of the donor's right of reverter, yet the having of children was in the nature of a condition precedent; and therefore if the donee never had a child, the donor might bring his formedon in reverter, and recover against any alienation or disposition of the donee.

2 Inst. 336; Plowd. 235.

(B) Of what Things a Formedon will lie.

It seems that all such inheritances, as may be entailed, may be recovered in a formedon, and that therefore it lies not only of lands, but also of rents (*a*), commons, estovers, or other (*b*) profits arising from lands.

Co. Lit. 20, vide tit. *Estates-tail*, letter (A). (*a*) But it is said, that if one grants common of pasture to a man and the heirs of his body, and the donee dies, and the heir is deforced of the common, he shall not have a formedon in descender of the common, but a *quod permittat*, in the nature of a formedon, and shall count upon the gift and special matter. F. N. B. 212, B. (*b*) As, if a man grants the moiety of the profits arising out of his mill unto another man, and the heirs of his body, and the donee dieth, and his heir is deforced of the profits, the heir shall have a formedon in the descender for those profits. F. N. B. 212, B.—So, if one grant to a man, and the heirs of his body, pasture for twenty oxen, or for an hundred sheep, &c., and the donee die, and his son, who is his heir, be deforced thereof, he shall have a formedon in the descender. F. N. B. 212, B.

But no formedon will lie for things merely personal, which only charge the person, and neither issue out of land nor relate to it, and therefore cannot be demanded as a tenement in a *præcipe*. As, if A grants to B and the heirs of his body, to be master of his hawks, or keeper of his hounds, with a fee or salary annexed to it, the issue of B cannot have a formedon thereof.

Ro. Abr. 837; Plowd. 2.

If there be a custom in a manor, that copyholds may be entailed, which co-operating with the statute *de donis* is allowed to be good, the issue in tail may have a formedon of such lands.

Co. Lit. 60, vide tit. *Copyhold*.

(C) How the Demandant must set forth his Title.

THE demandant in a formedon in the descender must make himself heir to him who was last seised by force of the entail. But he (*e*) need not

(C) How the Demandant must set forth his Title.

mention an ancestor who happened to be inheritable, but was never seised by force of the entail; as, if there be a grandfather, father, and son, and the father die in the lifetime of the grandfather, the son may bring his formedon without alleging any right in the father. So, if the donee in tail has two sons, and the eldest dies in his lifetime, the second may, after the death of his father, bring his formedon without taking notice of the eldest son.

Reg. 243; 8 Co. 87; Dyer, 216, pl. 56; F. N. B. 212, F; Booth, 143; Hetl. 78. (c) Where in formedon in descender, the demandant made himself heir unto every one that had been inheritable to the entail, though by the register he should make himself heir only unto them that were seised by the force of the entail; yet the writ was holden good. Cited from the Year-book, 11 H. 6, 20; Hob. 51, 52. But he must not fail to make himself heir to all that were seised. Hob. 52.

So, where in a formedon in descender, the demandant set forth, that the right descended unto him as brother and heir to the donee, without alleging that the donee died without issue, it was holden good; for he could not be heir to his brother unless the brother had died without issue.

Barrow v. Haggett, 1 Mod. 219; 2 Mod. 94, S. C.

In formedon in reverter, the demandant need not in his writ or count allege, that all the issue inheritable are dead; but it is sufficient for him to say, that the donee is dead without issue; and that after his death it ought to revert to him, for he is (a) a stranger to the pedigree, and therefore not obliged to make it out.

Dyer, 216, pl. 55; Booth, 155; Dyer, 14, pl. 75, 19, pl. 90. (a) But in this writ, none of the ancestors of the donor, that were seised of the reversion descended, are to be omitted in the pedigree. Booth, 155.

So, in a formedon in remainder, the demandant need not allege that all the parties are dead, for he is equally a stranger, as in the precedent case; and it is sufficient for him to show, that he who last inherited by force of the entail is dead without issue.

Booth, 155; 3 Lev. 218; Leon. 286; Brownl. 155.

So, in a formedon in remainder upon an estate-tail limited to P and K, the remainder to F in fee, *et quæ post mortem* P and K, to T son and heir of F, ought to remain; the writ was adjudged good without laying expressly the death of F, though it was urged that the form of the register was so, because the laying of T to be heir of F doth import as much.

Hob. 51.

But in a formedon in remainder, it is not sufficient for the demandant to allege, that the issue in tail is dead without issue, without saying that the tenant in tail is also dead without issue, for he in remainder can have no title unless the estate-tail be spent; and it is not implied that because the issue is dead without issue, that therefore the tenant in tail is, for he may have other sons besides his eldest.

5 Mod. 17, *per* Holt, C. J.

Also, if there be tenant in tail who hath three sons, and the second levy a fine in the lifetime of his father, and the lands descend to the eldest, in whose lifetime the second son dies, although the youngest son may, on the death of the eldest, bring his formedon in descender, and lay down the entail, and then bring it to his eldest brother that was last seised, and make himself immediate heir unto him without mention of the second brother; yet, if the second son survive the elder, the tenant in the

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formedon may plead the fine of the middle brother, and that he or issue did survive, &c., and this will be a good bar.

Hob. 333.

In a formedon in descender, by husband and wife, in right of the wife, the descent must be made in the writ to the wife alone, for the descent followeth the blood, and to that the husband is a stranger.

Hob. 1; Brownl. 154, S. C.

In a formedon in remainder, the demandant ought to show the deed of gift, if *oyer* be required thereof, but he need not mention it in his count, but the tenant is to demand *oyer* thereof.

F. N. B. 219, C; Booth, 153.

(D) Of the Tenant's Plea in Abatement or Bar.

THERE are several pleas both in bar and abatement, which the tenant may plead to this action; such as (a) non-tenure, which is a plea in abatement, and by which the tenant shows that he is not tenant of the freehold, or of some part thereof, at the time of the writ brought, or at any time since; which is called pleading non-tenure generally.

Booth, 28. (a) This plea is founded on that rule laid down by Bracton, l. 5, c. 27. *Amittere non potest quod non habet, et ita cadit breve.*

Special non-tenure is where the tenant shows what interest and estate he hath in the land demanded, as that he is tenant for years, in ward, by statute-merchant, elegit, or the like; and therefore the plea of special non-tenure must always show who is tenant.

Booth, 29.

In a formedon in descender against three, who plead non-tenure, and issue thereupon joined, it was found specially that two of them were lessees for life, the remainder to the third person; and whether the three were tenants, as the writ supposed, was the question; and it seems by the book that they were, for they should have pleaded several tenancy, and then the demandant might maintain his writ.

Brownl. 153, Pit v. Staple.

At common law, non-tenure of parcel of an entire thing, as a manor, &c., abated the whole writ; but now by the 25 E. 3, c. 16, it is enacted, "That by the exception of non-tenure of parcel, no writ shall be abated, but only for that parcel whereof the non-tenure was alleged."

Booth, 29; Mod. 181.

If the tenant pleads non-tenure of the whole, he need not show who is tenant; but in a plea of non-tenure of parcel he must show who is tenant, and this even before the statute; for the common law would not suffer a writ good in part to be wholly destroyed, except the tenant showed the demandant how he might have a better.

Mod. 181.

The tenant cannot, after a general imparlance, plead non-tenure of part, though he may plead non-tenure of the whole.

3 Lev. 55, Barrow v. Hagget.

In a formedon in reverter it hath been adjudged, that if the tenant pleads non-tenure generally, the demandant may maintain his writ that he is tenant, though he can recover no damages; and that Littleton and Coke were not to be intended of simple plea of non-tenure, but of non-tenure with a disclaimer, as the pleadings were usually in Littleton's time; for upon the

simple plea of non-tenure, supposing the tenant hath no freehold, but a reversion in fee, the demandant shall not be restored to the fee, for nothing is disowned by the simple plea of non-tenure but only the freehold ; which may be true, and yet he may have the reversion in fee. But, when the tenant disclaims, or pleads non-tenure and disclaims, demandant shall be restored to the whole, because he hath disclaimed the whole.

Hunlock v. Petre, 3 Lev. 330 ; 2 Lutw. 963, S. C.

A feoffment and lineal warranty, with assets, by descent, may be pleaded in bar to a formedon in the descender. So, a collateral warranty, without assets, before the statute 4 & 5 Ann. c. 16, s. 21, might be pleaded in bar to such a formedon.

2 Inst. 291 ; Booth, 163 ; vide tit. *Warranty*.

So, a common recovery may be pleaded in bar to a formedon in remainder or reverter, either with double or single voucher ; with single, if the tenant to the writ were seised of the estate-tail at the time of the recovery ; with double voucher, if he were not seised.

Booth, 164 ; vide tit. *Fines and Recoveries*.

In a formedon the tenant may plead in bar an exchange between the ancestor of the demandant and him under whom the tenant claims, and that the demandant entered into the lands given in exchange, and takes the profits ; and an alienee may plead this plea, though he be a stranger, for he is privy in estate.

Booth, 165.

*Non dedit*, i. e. no such entail, is a good plea in bar of all formedons, and it may be pleaded by the vouchee.

Co. Ent. 32 b ; Booth, 163.

To a formedon in remainder may be pleaded in bar an estate-tail, made by another long before the donor in the count had any thing, and that the tenants are heirs to the first entail.

Booth, 164.

A remitter may be pleaded in bar, as thus ; that the donee was seised in fee, and being an infant made a feoffment to the donor, who gave the land to the infant in tail, by which he was remitted, whose estate the tenant hath.

Booth, 164

If in a formedon in remainder the tenant pleads infancy, and that the remainder descended to him, and prays his age ; and the demandant pleads that the remainder did not descend to him, and thereupon issue is joined, and found for the demandant ; a final judgment shall be given notwithstanding the infancy of the tenant.

Amcot v. Amcot, 1 Lev. 163 ; Sid. 118, 252, S. C. But for this vide tit. *Infancy and Age*.

The tenant may plead, that the demandant, at the day of the purchase of the writ, was (a) seised of the lands for which the formedon was brought ; but in such plea he must show of what estate.

Winch. 23 ; Dyer, 137 b, pl. 26. (a) That if the demandant enters into any part of the land after the writ purchased, this falsifies his writ ; and therefore the writ shall abate for the whole.—That if the tenant pleads entry into part pending the writ, he ought to say that he entered and expelled the other. Winch. 23.

It is holden as a rule, that nothing can be pleaded in abatement to this action after a view, but what arises upon the view.

3 Lev. 219.

Vide tit. "LIMITATION OF ACTIONS (B).



## FRAUD.

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**FRAUD**, (*a*) *covin*, *collusion*, and *deceit* are often used as synonymous words, and in whatever shape or form they appear, are always deemed odious in the eye of the law.

Co. Lit. 3 b. (*a*) My Lord Coke defines *covin* to be a secret assent, determined in the hearts of two or more, to the defrauding and prejudice of another. Co. Lit. 357. *β* Though “*fraud*, *covin*, *collusion* and *deceit*,” are often used as synonymous words, they are very different from each other. *Fraud* has several meanings: 1. It is the act by which one person unlawfully, designedly, and knowingly appropriates to his own use the property of another without a criminal intent; 2. It is any artifice employed by one person to induce another to fall into an error, or to detain him in it, so that he may make an agreement contrary to his interest. Bouv. L. D. h. t. *Covin* is a secret contrivance between two or more persons to defraud and prejudice another of his rights. Co. Lit. 357 b. *Collusion* is an agreement between two or more persons to defraud another of his rights by the forms of law, or to obtain an object forbidden by the law. Bouv. L. D. h. t. *Deceit* is a fraudulent misrepresentation or contrivance by which one man deceives another, who has no means of detecting the fraud, to the injury or damage of the latter. Bouv. L. D. h. t. *g*

|| In considering fraud criminally, it is often difficult to determine whether the facts in evidence constitute a fraud or amount to a felony. It seems now to be agreed, that if the property obtained, whether by means of a false token or a false pretence, be parted with absolutely by the owner, it is a fraud; but if the possession only be parted with, and that possession be obtained by fraud, it will be felony.

R. v. Atkinson, 2 Leach's Ca. 1066; 2 East, P. C. 673. ||

But for the better understanding hereof we shall consider,

- (A) What Acts are condemned in the Common Law Courts as fraudulent, though not within the express Provision of any Act of Parliament.
- (B) What Acts are deemed fraudulent in the Courts of Equity.
- (C) Of fraudulent Conveyances to defeat Creditors and Purchasers within the 13 & 27 Eliz.
- (D) In what Court Fraud is cognisable.
- (E) Where a Wrong-doer is farther punishable than by making void the fraudulent Act.

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(A) What Acts are condemned in the Common Law Courts as fraudulent, though not within the express Provision of any Act of Parliament.

HERE it may be laid down as a general rule, that without the express provision of any (*a*) act of parliament, all deceitful practices in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence.

Co. Lit. 3 b; Dyer, 295; Hawk. P. C. c. 71. (*a*) As to the most remarkable statutes against fraud and imposition, vide the statute of Merton, or 20 H. 3, c. 5, against the lord's enfeoffing his son and heir apparent to defeat the king of his wardship; and the statute 4 H. 7, c. 17, to the same purpose; the statute of Gloucester, or 6 E. 1, c. 11, for securing the interest of termors against recoveries by fraud; but more particularly the 21 H. 8, c. 15, which enables termors to falsify recoveries against their

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lessors. Westm. 2, or 13 E. 1, c. 4, for securing the wife's dower against a fraudulent recovery suffered by the husband. 9 R. 2, c. 3; 13 R. 2, c. 12; 32 H. 8, c. 38, for securing the interest of reversioners against recoveries suffered by fraud by particular tenants, such as tenant for life, dower, curtesy, and after possibility of issue extinct. 5 E. 3, c. 6, and 2 R. 2, c. 3, for securing creditors against such as take sanctuary. 1 R. 2, c. 9, against fraudulent feoffments to persons unknown. ||The 1 H. 7, c. 1, which gives a formedon in remainder against the pernor of the profits.|| 3 H. 7, c. 2, which makes deeds of gift of goods or chattels, in trust for the maker, void. ||The 32 H. 8, c. 9, against the buying of pretended titles.|| 33 H. 8, c. 1, and 30 Geo. 2, c. 24, against obtaining money or goods by false tokens. ||The 5 & 6 Edw. 6, against the sale of offices.|| The 13 Eliz. c. 5; 27 Eliz. c. 4, which are inserted under this head. 29 Car. 2, c. 3, emphatically called the "Statute of frauds." 3 & 4 W. 3, c. 14, against fraudulent devises. 4 & 5 W. 3, c. 16, against fraudulent mortgages; and 10 Ann., c. 23, against fraudulent conveyances to multiply votes at elections of knights of the shire; and the statutes against frauds by persons becoming bankrupts, for which vide tit. *Bankrupt*.

Such as (a) causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written.

Sid. 312. β To induce an illiterate man, by false representations and false reading, to sign a note for a greater amount than that agreed on, is an indictable offence. 1 Yerg. 76. *g* [And this, though it be read to him by a stranger to the party to whom the deed is made. 2 Co. 9.] (a) So, if one persuades a woman to execute writings to another as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment, &c. Sid. 431.—So, if he suppresses a will. Noy, 103.—Or levies a fine in another's name. Noy, 99; Moore, 630; Cro. Eliz. 531; Mod. 46; 2 Jon. 64.—If he sues out execution upon a judgment obtained by another person. Noy, 99.—Or if he acknowledges an action in the name of another, without his privity and against his will. Noy, 99.—In which cases the record may be vacated, and also the wrong-doer punished by information or indictment, and obliged to answer in damages, to the party injured, by an action on the case. Hawk. P. C. 187, 188; 6 Mod. 42, 61, 104, 301, 311; 2 Ld. Raym. 1179.

Also it is a rule, that a wrongful (b) manner of executing a thing shall avoid a matter that might have been executed lawfully.

Co. Lit. 35. (b) Where a person by adding a seal to a note, which was sufficient without a seal, lost his security. 2 Vern. 162. β There are some acts which the law considers fraudulent without inquiring into the motive of such acts; not because arbitrary rules on the subject have been laid down, but such acts carry in themselves irresistible evidence of fraud. *M'Brown v. Rives*, 1 Stewart, 72. *g*

As, if a man that has a right of action to certain lands, by covin causes another to oust the tenant of the land to the intent to recover it from him, and he recovers accordingly against him by action tried; yet he shall not be remitted to his ancient right, but is in of the estate of him who was the ouster.

41 As. 28; 44 As. 29; Ro. Abr. 420, 549; Co. Lit. 357; Poph. 64, 100.

So, if one man disseises another of land, to which a woman hath title of dower by covin, and with consent of the woman, to the intent to endow her, and he endows her in the (c) country accordingly, yet this is of no effect against the disseisee, but he may oust him because of the covin.

44 Ass. 29; Ro. Abr. 549. (c) The same law, though the endowment was upon a recovery against him in a writ of dower, because of the covin. 44 Ass. 29; Ro. Abr. 549.—And although the assignment was indifferently made by the sheriff of an equal third part, yet shall the disseisee avoid it. Co. Lit. 357 b; 3 Co. 78; 5 Co. 31 a; 6 Co. 58 a; 8 Co. 132 b.

β It is the settled American doctrine, that a *bonâ fide* purchaser for a valuable consideration is protected under the statutes of 13 & 27 Eliz., whether he purchased from a fraudulent grantor or a fraudulent grantee, and

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that there is no difference in this respect between a deed to defraud creditors and one to defraud subsequent purchasers.

Hood v. Fahnestock, 8 Watts, 489.*d*

If goods are sold in a market-overt, by covin, between two, on purpose to bar him that has a right, this shall not bar him thereof.

2 Inst. 713; Cro. Eliz. 86.  $\beta$  A fraudulent purchase of goods gives no title to the fraudulent purchaser, as against the seller; nor does his transfer of the goods by assignment to a *bonâ fide* creditor of his, in payment of a pre-existing debt, vest the title in such creditor; on the contrary, if the creditor detains the goods after demand to deliver them up, the seller may maintain replevin against him for the goods. Root v. French, 13 Wend. 570.*g*

$\beta$  In Pennsylvania, there is no law or custom by which the property of goods is divested from the true owner by a public sale in the nature of market-overt.

Hassack v. Weaver, 1 Yeates, 478; Thomas v. Hess, 1 Yeates, 479; Harder v. Metzgar, 2 Yeates, 347; Easton v. Worthington, 5 S. & R. 130; Lecky v. M'Dermott, 8 S. & R. 500; Patterson v. M'Vay, 7 Watts, 482.*g*

As to frauds in contracts and dealings, the common law subjects the wrong-doer, in several instances, to an action on the case; as, if a person having the possession of goods sells them to another, (a) affirming them to be his own, when in truth they are another's, an action on the case lies.

Ro. Abr. 90; Cro. Ja. 474. But for this vide tit. *Actions on the Case*, letter (E). (a) That the having the goods in his possession is a warranty in law that they belong to him. Salk. 210; Ld. Raym. 593.

But, if A, possessed of a term for years, offers to sell it to B, and says that a stranger would have given him twenty pounds for this term, by which means B buys it, though in truth A was never offered twenty pounds, no action on the case lies, though B is hereby deceived in the value.

Ro. Abr. 91, 101; Sid. 146; Yelv. 20, S. P. And that in these cases it was the plaintiff's folly to believe him.

But, if on a treaty for the purchase of a house, the defendant affirms the rent to be thirty pounds *per ann.*, whereas in truth it is but twenty pounds, and thereby the plaintiff is induced to give so much more than the house is worth, an action on the case lies; for the value of the rent is matter that lies in the private knowledge of the landlord and tenant, and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it.

Salk. 211, pl. 3; Risney and Selby, Lev. 102; Sid. 146; Keb. 510, 518, 522, S. P. adjudged.

If a vintner sells (b) wine, which he warrants to be sound and not corrupted; or if a person sells any (c) commodity which he warrants to be good; if it proves otherwise, an action on the case lies against him.

11 H. 6, 18; F. N. B. 96; Dyer, 75, *in margine*. (b) If the servant of a taverner sells wine to another which is corrupted, an action upon the case lies against the master though he did not command the servant to sell it to any particular person. 9 H. 6, 53; Ro. Abr. 95. But, if a servant sells an unsound horse, or other merchandise, in a fair, no action lies against the master, unless he commanded him to sell to a particular person. 9 H. 6, 53; Ro. Abr. 95; Poph. 1, 43; Bridgm. 128.—But it seems, that in these cases no action lies against the servant. Ro. Abr. 95.—So, if an attorney, in an action of debt, knows of and was a witness to a release of the debt, made before the action brought for it, yet no action lies against the attorney, for he acted only as a servant, and in the way of his calling. Mod. 209. [See Barker v. Braham, 2 Bl. Rep. 869.] (c) So, an action on the case lies against a goldsmith for mingling dross with his plate. Cro. Ja. 471; 2 Ro. Rep. 28.—So against a jeweller for selling counterfeit jewels 2 Ro. Rep. 5, 26, 27; Poph. 123; Cro. Ja. 469, S. C.—So, for selling

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silk of such a nature, whereas it was of a different kind. Salk. 289.—So, on a promise to deliver ten pots of good and merchandisable potashes, and delivering potashes mixed with dirt. Vent. 365. *β* Falsehood and concealment will generally be sufficient to set aside an agreement. White v. Cox, 3 Hayw. 79; White v. Flora, 2 Tenn. 427; 3 Hayw. 141; Mart. & Yerg. 333; Donelson v. Weakley, 3 Yerk. 178; Pearcey v. Huddleston, 3 Yerg. 36.*g*

If A is employed by B to sail from England to the Indies, and A covenants that he or his servants will not thence import any calicoes, &c., and A retains C as his servant in this voyage, and acquaints him with the covenants; and notwithstanding C falsely and fraudulently brings thence certain calicoes, &c., A shall have an action against C; for though no action lies by a master for a bare breach of his command, yet if a servant does any thing falsely and fraudulently to the damage of his master, an action will lie.

Hussy v. Pacy, Sid. 298; 2 Keb. 88, S. C.; Lev. 188, S. C., adjudged, though objected, it was not laid to be done *ea intentione* to damnify the plaintiff; for let C intend *quicquid velit*, A was damnified thereby. Ro. Abr. 105, like point.

If A is excommunicated, and the letters of excommunication are brought to the parson of the parish to be read and published in the church against A, and the parson, having malice to B, inserts his name instead of the name of A, and pronounces him excommunicated, an action on the case lies.

Harris's case, Ro. Abr. 100; Cro. Eliz. 838, S. C.

If a man chases the cattle of another into the lands of J S, whereby he is subject to the action of J S, an (*a*) action on the case lies against him.

Ro. Abr. 100, 101; Cro. Car. 325, S. C. (*a*) So, if one person affirms that another's sheep are strays, by which they are seized upon by the bailiff of the manor, an action on the case lies. Allen, 3; Ro. Abr. 101.

If A hath judgment against B, and J S, with an intent to defeat him of the benefit of it, persuades B to acknowledge a judgment to a stranger, to whom in truth he owed nothing, and thereupon his goods are taken in execution, &c., A may bring an action on the case against J S on this fraud and combination.

Carth. 3, Smith v. Tonstall, adjudged in B. R. and affirmed in the House of Lords.

If land be aliened pending a writ of debt, by covin, to avoid the extent thereof for the debt; yet, when the covin appears upon the return of the *elegit* by the sheriff, the land so aliened shall be extended.

Ro. Abr. 549.

If a man makes a feoffment to the use of his son, an infant, and not in consideration of marriage, &c., and ten days afterwards commits treason, of which he is attainted, this land shall be forfeited; for the feoffment was fraudulent against the king.

2 Ro. Abr. 34. *β* See Doyle v. Sleeper, 1 Dana, 531.*g*

But if the feoffment had been made in pursuance of an agreement entered into before, by which it was agreed, in consideration of his wife's settling her lands in such manner, that he would also settle his lands on his son; this, it seems, is not fraudulent, but good against the king.

2 Ro. Abr. 34.

A being in Newgate for a robbery makes a bill of sale of all his goods, to the intent to make a provision for his son, and is afterwards convicted and executed; and in an action of trover brought by the son against the sheriff of London, it was holden by Holt, Ch. Just., that the bill of sale was fraudulent; for though a sale *bonâ fide*, and for valuable consideration, had been good, because the party had a property in the goods till conviction,

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and ought to be reasonably sustained out of them, yet this (a) conveyance is fraudulent at common law, for it cannot be intended to any other purpose than to prevent a forfeiture, and defraud the king.

Skin. 357, Jones v. Ashart. (a) That if a man aliens his lands fraudulently, with an intent to prevent a forfeiture, and afterwards commits felony, the land shall be forfeited. Ro. Abr. 34.

A man takes a wife, and afterwards marries another, his first wife living, and by deed gives part of his goods to his pretended second wife; it seems this is a fraudulent gift within 13 Eliz. c. 5, and by the common law too, in respect of creditors, because made without any valuable consideration; for the second pretended marriage is so far from coming under the notion of a consideration, that it is a crime punishable by law.

2 Leon. 223. {A bond given to the second wife as some compensation for the injury done to her, conditioned to secure her an annuity for life, and a sum of money if she survive the husband, is without consideration and void against creditors. But if arrears become due on such bond, they will be a valuable consideration, which will support against creditors a conveyance made to discharge them. 9 Ves. J. 612, Gilham v. Locke; 2 Atk. 152, Stiles v. The Attorney-General.}

A man has a judgment for a just debt against A, and takes out a *fiery facias*, and gets the sheriff to seize his goods, but would not let him proceed further, but suffered the goods to remain in the custody of A the debtor: B who has a judgment against A for a just debt, takes out a *fiery facias*; and the question was, whether he could seize upon the same goods. And it was holden *per Cur.* that he might, for the former was a fraudulent execution, and the sheriff might very well return *nulla bona* upon it.

7 Mod. 37, Rice v. Serjeant. See also 1 Wils. 44; Ld. Raym. 252; 5 Mod. 375.

If there is judgment in debt against J S, and he suffers himself to be (b) outlawed for felony with an intent to defraud his creditors, and afterwards he purchases his pardon and hath restitution, the creditor may well take out execution for this apparent fraud.

Dyer, 245 b, *in margine.* (b) Where a prisoner in the Fleet, at the suit of divers creditors, procured himself to be accused of felony, and to be removed to the King's Bench, with an intent to plead guilty, and after the allowance of clergy, to get quit; the king being informed of this practice by his privy seal directed the justices not to proceed on his arraignment, without farther directions from him. Dyer, 247.

A man came by *habeas corpus* out of London, and had no cause to have the privilege of the Common Pleas, but by his covin: it was ordered, that he should be in execution till he had paid the debt recovered against him after the writ brought, and that after he should be remanded to answer the plaintiffs there.

39 H. 6, 50 b; Ro. Abr. 549; Cro. Car. 128.

Hence it appears, that the making use of the process of the law is not only a fraud, but an aggravation of the offence; as, if a person intending to steal a horse takes out a replevin, and thereby has the horse delivered to him by the sheriff; or if one intending to rifle goods, gets possession from the sheriff, by virtue of a judgment obtained, without any the least colour of title, upon false affidavits, &c.

2 Inst. 108; H. P. C. 63; Kelynge, 43; Sid. 254; Raym. 267.

If A on a quarrel with B tells him that he will not strike him, but that he will give B a pot of ale to strike him, and thereupon B strikes, and A kills him, he is guilty of murder, for he shall not elude the justice of the law by such a pretence to cover his malice.

H. P. C. 48; Hawk. P. C. c. 31, § 24.

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So, if B challenge A, and A refuse to meet him ; but, in order to **evade** the law, tell B that he shall go the next day to such a town about his business, and accordingly B meet him next day on the road to the **same** town, and assault him, whereupon they fight, and A kills B, he seems guilty of murder, unless it appear by the whole circumstances, that he gave B such information, accidentally, and not with a design to give him an opportunity of fighting.

Hawk. P. C. c. 31, § 25.

If a person takes a lodging in a house, under the colour thereof to **have** the opportunity of rifling it, and to elude the justice of the law, by **endeavouring** to keep out of the letter of it, by gaining a possession of the goods with the consent of the owner, he seems to be as guilty of felony as any other felon, in as much as his whole intention was to defraud the law.

Kelynge, 24, 81 ; Show. 50, 51. This at common law was not clearly felony, for 3 & 4 W. & M. c. 9, was passed to make it so.

||With respect to warranties on sale of goods, it is now settled that the rule established as to sale of horses, applies to other goods, that unless an express warranty is given or fraud is practised by the seller, he is not answerable though the goods turn out to be unmerchantable, notwithstanding a fair merchantable price be given.

Parkinson v. Lee, 2 East, 314 ; Gray v. Cox, 4 Barn. & C. 108.

But a warranty is implied in every contract, that the goods are of the denomination for which they are sold, as for instance that goods sold as “scarlet cuttings” are what is known in the market as “scarlet cuttings.”

Bridge v. Wain, 1 Stark. 504 ; Gardiner v. Gray, 4 Camp. 144 ; and see Laing v. Fidgeon, 6 Taunt. 108.

In an action on a warranty, the *scienter* need not be charged or proved. Williamson v. Allison, 2 East, R. 446.

As to stealing from lodgings, the 3 & 4 W. & M. c. 9, is now repealed, and by 7 & 8 G. 4, c. 29, § 45, (extending and improving the former provision,) if any person steal any chattel or fixture, let with any house or lodging, he shall be guilty of felony, and liable to be punished as for simple larceny, and the indictment may be in the common form as for larceny, and the property may be laid in the owner or person letting to hire.

The grantee under a conveyance executed to give a colourable qualification to kill game, may maintain ejectment against the grantor, for the latter cannot set up his own fraud to invalidate the deed.

Doe v. Roberts, 2 Barn. & A. 367.

Courts of law and equity have a concurrent jurisdiction in cases of fraud, and therefore a demurrer for want of equity will not lie to a bill for relief against a fraudulent policy of insurance.

Sowerby v. Warder, 2 Cox, R. 268 ; and see Evans v. Bicknell, 6 Ves. 182.

The effect of a wilful misrepresentation as to credit, is to give a remedy on the ground of fraud, but this is administered with great caution ; and in bankruptcy where the evidence of the party is received, it must be in every particular consistent, clear, and unambiguous.

*Ex parte Carr*, 3 Ves. & B. 108.

Estates in mortgage were sold under a decree to pay off the mortgage debts, but which was obtained by collusion between the tenant for life and

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others, to the prejudice of the remainder-men in tail, and part of the estates was purchased by one cognisant of the fraud, and part by one who was not, though he might have known it, from a knowledge of the proceedings to obtain the decree under which the estates were sold. A remainder-man in tail (three months after his title accrued,) filed a bill to set aside the sale, and for a reconveyance of the estates, which was dismissed. On appeal against so much of the decree as related to those claiming under the purchase with knowledge of the fraud, the decree was so far reversed by the House of Lords; Lord Redesdale doubting whether it ought not also to have been reversed as to the purchaser, who though not cognisant of the fraud, might have been so if he pleased.

*Gore v. Stackpoole*, 1 Dow, P. C. 18.||

β A contract was made by a public agent on behalf of the government with an individual, in the profits of which the public agent was to participate. In the execution, false measures were imposed on the government, and then the fraud was discovered. A bill in equity was filed to compel an alleged partner to account for, and pay one of the parties to the transaction a loss sustained by an unsuccessful attempt to impose spurious vouchers on the government. It was held that this action could not be sustained.

*Bartles v. Coleman*, 4 Pet. 184.

Where a vendee applied to the owner to purchase a lot of wild lands, and represented to him, it was worth nothing except for a sheep pasture, when he knew there was a valuable mine upon it, and the owner sold him the lot, being ignorant of the existence of such mine, it was held that this was such fraud as would avoid the sale.

*Livingston v. The Peru Iron Company*, 2 Paige, 390.

An action can be maintained for a false and fraudulent representation of the responsibility of a person, by which an injury has been sustained by the plaintiff to whom it was made.

*Weeks v. Burton*, 7 Vern. 67. See *Harris v. Alcock*, 10 Gill & Johns. 226.

It is fraudulent to receive from one partner, for his own separate debt, the security of the firm, unless such partner has authority from the other partners to that effect, or unless the creditor has reasonable and probable cause, from the conduct of the firm, that such authority has been given.

*Miller v. Richardson*, 2 Iredell, 250.

The holder of a note, who fraudulently procures it to be endorsed by a minor, and afterwards sells it to a person who relies on the validity of such endorsement, is liable to an action by such person, though, at the time of sale, he had no fraudulent intent. Selling the note without erasing such endorsement, or disclosing the minority of the endorser, is tantamount to a direct affirmation by the seller, that the endorsement constitutes a valid contract.

*Loddell v. Baker*, 1 Metcalf, 193.

It is a fraud to induce one who is so drunk that he does not know what he is about, to sign a paper for an alleged debt which in fact he does not owe.

*King's Executors v. Bryant's Executors*, 2 Hay. 394. See 2 Aik. 167; 1 Bibb, 168; 2 Hay. 82; 1 South. 361; 1 Hill, 313; 1 Green, 233; 2 Verm. 97.

An agreement between a person employed as a puffer at an auction and the owner of the property to be sold, that the former shall bid for the purpose of raising the price upon fair purchasers, is fraudulent and

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void, (a) and an association of bidders agreeing that they will not bid for the purpose of stifling competition, is also fraudulent. (b)

(a) *Troughton's administrator v. Johnston*, 2 Hay. 328. (b) *Smith v. Greenlee*, 2 Dev. 126.

The defendant by his agent purchased of the plaintiff a policy on the life of a party whom both the defendant and his agent knew to be dangerously ill, without communicating the circumstance to the plaintiff; held that the sale was thereby rendered void, and the latter entitled to recover the amount of the policy in trover.

*Jones v. Keene*, 2 Mood. & Ry. 348.

Falsely representing a person to be deserving of credit when in fact he is not, is a fraud, which will make the person recommending liable.

*Allen v. Addington*, 7 Wend. 9; *Ward v. Center*, 3 Johns. 271; *Gallagher v. Brunell*, 6 Cowen, 350.

The owner of a horse which had the heaves, and was worthless, in the course of negotiation for an exchange concealed the defect, and stated that the horse was worth one hundred dollars; the other party, ignorant of the defect, was thereby induced to make the exchange: held that this was fraudulent.

*Stevens v. Fuller*, 8 N. H. Rep. 463.

A machinist who sells a worthless machine for a good one, is guilty of a fraud, whether he knew the defect or not.

*Donaldson v. Young*, Meigs, 155. See *Hazard v. Irwin*, 18 Pick. 95.

Any concealment or misrepresentation by the vendor, in relation to the title of land, by which the purchaser is deceived, is fraudulent.

*Parham v. Randolph*, 4 How. 435. But see *Chambers v. Baptist Education Society*, 1 B. Monr. 222; *Dugan v. Cureton*, Ark. 31; *Bowen v. Kirwan*, Loyd & G. Temp. Sug. 47; *Ross v. Elizabethtown and Somerville R. R. Co.*, 1 Green's Ch. 222.

It is a mark of fraud, in a grossly unequal agreement made between persons standing in a confidential relation to each other, that the assignee alone gave directions to the counsel who drew the instruments, and that the assignor had no opportunity of consulting or advising with counsel.

*Buffalow v. Buffalow*, 2 Dev. & Bat. Eq. 253. See *Gasborne v. Garsham*, 2 Beav. 76.g

## (B) What Acts are deemed fraudulent in the Courts of Equity.

It is clearly agreed, that all covins, frauds, and deceits, for which there is no remedy by the ordinary course of law, are properly cognisable in equity; and it is admitted, that matters of fraud were one of the chief branches to which the jurisdiction of Chancery was originally confined.

4 Inst. 84. See of the jurisdiction of the court of Chancery, tit. *Courts*. β When courts of law give a complete remedy courts of equity will not interfere. *Glasgow v. Flowers*, 1 Hay. 233; *Perkins v. Ballinger*, 1 Hay. 367; *Martin v. Spier*, 1 Hay. 369.g [Where a court of equity absolutely sets aside a deed for fraud, and the estate in question passed by that deed only, it will not direct a reconveyance. *Secus*, where the estate has been conveyed to a third person as an instrument not privy to the fraud; or if the deed is set aside upon paying so much money; for there, till payment, the estate remains. *Bates v. Graves*, 2 Ves. jun. 294. In *Chesterfield v. Janssen*, 2 Ves. 155, Lord Hardwicke enumerates four species of fraud: 1st, Fraud arising from facts and circumstances of imposition, which is the plainest case: 2dly, Fraud may be apparent from the intrinsic value and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other; which are inequitable and unconscionable bargains, and of such even the common law has taken notice. A third is that which may be presumed from the circumstances and conditions of the parties contracting; and this goes farther than the rule of law,



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which is, that fraud must be proved, not presumed: but it is wisely established in a court of equity, to prevent taking any surreptitious advantage of the weakness or necessity of another, which, knowingly to do, is equally against conscience as to take advantage of his ignorance. A fourth kind of fraud may be collected or enforced, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement.]

But, as every case on this head depends so much upon its own circumstances, it will be difficult to range them in any other order than by inserting the most remarkable cases where the parties have been relieved against fraud and imposition.

As, where A being tenant in tail, remainder to his brother B in tail, A not knowing of the entail, made a settlement on his wife for life for her jointure, without levying a fine, or suffering a recovery which B who knew of the entail engrossed, but did not mention any thing of the entail, because, as he confessed in his answer, if he had spoken any thing of it, his brother, by a recovery, might have cut off the remainder, and barred him; although after the death of A, B recovered an ejectment against the widow by force of the entail; yet she was relieved in Chancery, and a perpetual injunction granted for this fraud in B in concealing the entail; for if it had been disclosed, the settlement might have been made good by a recovery.

Raw v. Potts, Pr. Ch. 35; 2 Vern. 239, S. C., and affirmed in the House of Lords.

So, where a mother being absolute owner of a term, the same being limited to her in tail, is present at a treaty for her son's marriage, and hears her son declare, that the term was to come to him at his mother's death, and is a witness to the deed, whereby the reversion of the term is settled on the issue of this marriage after the mother's death, she was compelled in equity to make good the settlement.

2 Vern. 150, *Hundsden v. Cheney*.  $\beta$  A person who looks on and suffers another to expend money on land which he has purchased, without letting his claim to the land be known, will not be allowed afterwards to assert his legal title against such purchaser. *Higinbotham v. Burnett*, 5 Johns. Ch. 184; *Reigul v. Wood*, 1 Johns. Ch. 402.*g*

If A by a marriage-settlement be tenant for life of certain mills, remainder to his first son in tail, and the son, who knows of the settlement, encourages a person to take a lease for thirty years of those mills, and to lay out considerable sums of money in new building and improving them, in order to reap the advantage thereof after his father's death; this is such a fraud and practice as ought to be discountenanced in equity, and therefore it was decreed in this case, that the lessee should enjoy for the residue of the term that remained unexpired after the father's death.

Abr. Eq. 357, *Hanning v. Ferrers*.

So, where a younger brother, having an annuity of 100*l.* *per annum* charged on lands by his father's will, agrees with J S to sell it to him, which J S is encouraged to purchase by the elder brother, who told him, that though he had heard that there was a settlement which had entailed those lands out of which it issued, that yet he had constantly paid this annuity, as also 3000*l.* charged by the same will to his sisters; and the elder brother afterwards got the settlement into his hands, and endeavoured thereby to avoid payment of this annuity; it was decreed in favour of the purchaser, that the annuity should still be paid purely on the encouragement given by the elder brother.

Vern. 136, *Hobbs v. Norton*.

So, where lands were in mortgage running through three descents, and

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the person entitled to redeem, not knowing how much was due for the interest, is informed by the heir of the mortgagee, that it was considerably less than really it was; whereupon he settles it upon his marriage, as subject only to so much; it was decreed, that those who derive under this settlement should redeem accordingly, without being obliged to pay the sum concealed, for the fraud.

Pr. Ch. 131, *Barret v. Wells*.

Francis Broderick, being seised of a considerable estate in fee, made his will, and devised it to Thomas Broderick, the defendant; Francis himself executed the will, but it was not attested in his presence by three witnesses. Francis died, and the defendant Thomas, finding that the will was void, for 100 guineas paid by him to the plaintiff George Broderick, who was Francis's heir at law, procured from the plaintiff a release, which recited that Francis, by his last will duly executed, had devised his estate to the defendant Thomas; and the defendant Thomas thinking himself not safe with the release only, for fifty guineas more prevailed with the plaintiff to convey the lands by lease and release to one Day, who was trustee to the defendant Thomas, to whom Day afterwards conveyed. Afterwards, the defendant Thomas, upon a valuable consideration, conveyed part to one Parker, who had not any other notice of the invalidity of the will, save that he heard it mentioned in common discourse. The plaintiff brought his bill against Thomas Broderick, Day, and Parker, to have the release, lease and release, delivered up as fraudulently obtained; and it not appearing that he knew at the time of his making the release, &c., that the will was bad, Lord Harcourt decreed that they should be delivered up: and it not appearing that Parker was privy to the fraud, though he had heard of the invalidity of the will as above, it was decreed that he, upon receiving his purchase-money with interest, should convey to the plaintiff, and should account for the rents and profits which he had received, and be allowed what he had laid out in repairs or otherwise.

*Broderick v. Broderick*, Vin. Abr. tit. *Circumvention*, p. 3; 1 P. Wms. 239. In this case it was decreed, that the defendant do account for the rents and profits of the freehold leases to the plaintiff, the plaintiff to have all just allowances for debts and legacies paid by him, and to account for 150 guineas to the defendant, with interest, &c. As to the purchaser *bonâ fide* of part of the freehold lands, he shall re-convey to the plaintiff, upon payment of the purchase-money with interest at *5l. per cent.*, because he had notice of the invalidity of the devise by common report, though not actual notice from the plaintiff or defendant; and though he was not a fraudulent purchaser, yet he was a rash one, and ought to have inquired into the validity of the will, or gotten the heir at law to join in the conveyance to him. *Ex relatione alterius*. Vin. Abr. *ubi sup.*

The father had, on his marriage, articled to settle his whole estate upon that marriage: but neglecting so to do, when the eldest son attained his full age, he, without giving the son notice of the articles, and by threats and promises prevailed with him to join in making a settlement on the younger children, and thereby to give the father a power of making a jointure upon another wife: the father afterwards gave a bond to make such jointure, and married. This bond was set aside as against the heirs, and the first articles were established, and the wife was put aside to seek satisfaction of her bond out of the personal estate.

*Jevers v. Jevers*, 4 Br. P. C. 199; 2 Eq. Cas. Abr. 54, pl. 13. See too *Scrope v. Offley*, 4 Br. P. C. 237, S. P.

Where on a treaty for a lease, it appeared that the agents of the lessor had in his presence represented the quantity of land proposed to be demised

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to be much more than it actually was; and that the lessor knowing that this was a misrepresentation, had assented to it, because he did not think it prudent to disclose the truth; the contract was set aside as fraudulent.

Mead v. Webb, 4 Br. P. C. 497.

An estate was settled after marriage upon trust, *inter al.* to raise portions for the daughters of the marriage upon failure of issue male, to whom the estate was limited in tail; one of the daughters gives a general release to her brother, but neither party at the time of such release being given had any knowledge of the settlement. The release, therefore, though general, was holden not to extend to the settlement, and the trusts of it were decreed to be performed.

Ramsden v. Hylton, 2 Ves. 304.

If A has a prior encumbrance on an estate, and is a witness to a subsequent mortgage, but does not disclose his own encumbrance; this is such a fraud in him, for which his encumbrance shall be postponed. (a)

2 Vern. 151, Clare and the Earl of Bedford, cited to have been decreed. (a) [In the case of Mocatta v. Murgatroyd, 1 P. Wms. 394, Lord Cowper is reported to have decreed that the first mortgagee shall in such case be postponed, though there be no actual proof of his knowing the contents of the deed he attested. But Mr. Cox, the editor of that book, has not been able to find this decree in the registrar's book. And Lord Thurlow said, in the case of Becket v. Cordley, that he thought that this case of Mocatta v. Murgatroyd went too far in imputing notice to the first mortgagee from the mere circumstance of his being a witness to the second mortgagee, since it is in common practice for persons to attest the execution of deeds without being made acquainted with their contents.]

So, where a counsel having a statute from A, advises B to lend A 1000*l.* on a mortgage, and draws the mortgage, with a covenant against all encumbrances, and conceals his own statute; it was holden, that the statute should be postponed to the mortgage.

2 Vern. 370, Draper v. Borlace. β If the owner of a tract of land sees it sold to another person, without disclosing his title, it is a fraud by which he forfeits his right. Engle v. Burns, 5 Call, 463.*g*

So, if A being about to lend money to B on a mortgage, sends C to inquire of D, who had a prior mortgage, whether he had any encumbrance on B's estate, if it be proved that C went to him accordingly, and that D denied that he had any, D's mortgage shall be postponed.

2 Vern. 554, Ibbotson v. Rhodes.

So, if A having a mortgage on a leasehold estate, lends the mortgage deed to the mortgagor, for the purpose of borrowing more money; this is such a fraud in the mortgagee, for which his mortgage shall be postponed to the subsequent encumbrance.

Peter v. Russel, 2 Vern. 726; Abr. Eq. 321, S.

The plaintiff's wife, before her intermarriage with the plaintiff, being possessed of a house for a term of years, as executrix to her first husband, which was liable, as assets, to the payment of his debts, in order thereto, and to raise money for that purpose, the plaintiffs after their marriage entered into an agreement with the defendant for the sale of the house for the residue of the term for 450*l.*, whereof 210*l.* was to be applied in discharge of a mortgage thereon to one J S, and the remaining 240*l.* was to be paid to the plaintiffs. Accordingly the plaintiffs executed an assignment of the house to the defendant, with a receipt endorsed thereon for the whole purchase-money, but the defendant did not then pay the purchase-money, but gave a note for the payment of 210*l.*, part thereof, to J S the mortgagee, and of the remaining 240*l.* to the plaintiffs; and for

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the non-payment thereof the plaintiffs brought their bill to have a specific performance and payment of the money accordingly. The defendant, by his answer, admitted the whole case to be as above set forth: but insisted, that he ought not to be bound thereby, for that the plaintiffs could not make him a good title, they having by articles before marriage agreed to settle this house for the benefit of themselves and their issue, of which he had no notice at the time of his purchase; and for a discovery of these articles, and to have up his note on a reassignment of the house, the defendant brought his cross bill. The plaintiffs by their answer admitted there were such articles, but insisted, that the house lying in Middlesex, those articles were never registered in the Middlesex office, and therefore void as against the plaintiff. But on a hearing at the Rolls, the Master of the Rolls decreed the original bill to stand dismissed with costs; and on the cross bill decreed the note given for the purchase-money to be delivered up on a re-assignment of the house, and the plaintiff in that cause likewise to have his costs, by reason of the plaintiff's fraud in concealing the articles; which decree was affirmed by my lord chancellor.

Abr. Eq. 357, *Beatniff v. Smith*.

So, in a case between two purchasers of lands in Yorkshire, where the second purchaser having notice of the first purchase but that it was not registered, went on and purchased the same estate, and got his purchase registered; it was decreed, that having notice of the first purchase, though it was not registered, bound him, and that his getting his own purchase first registered was a fraud, the design of those acts being only to give the parties notice, who might otherwise without such registry be in danger of being imposed upon by a prior purchase or mortgage, which they are in no danger of when they have notice thereof in any manner, though not by the registry.

Abr. Eq. 358, *Blades v. Blades*.

If a copyholder, by his will, intending to give the greatest part of his estate to his godson, and the other part to his wife, is persuaded by the wife to nominate her to the whole, on a promise that she would give the godson the part designated for him; it will be decreed against the wife on the point of fraud, though there was no *memorandum* thereof in writing pursuant to the statute of frauds and perjuries.

Pr. Ch. 3, *Devenish v. Baines*.

So, where the defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing comprising the terms of the agreement, and afterwards designing to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humour, and get the plaintiff to deliver up that writing, and then marry him, which she accordingly did, and the defendant stood by, at a corner of a street, to see them go by to be married; the plaintiff was relieved on the point of fraud.

Halfpenny v. Mallet, Eq. Ca. Abr. 28; 2 Vern. 373, S. C.

[A father purchased lands to him and his heirs, and when he was on his death-bed sent for his eldest son, and told him that these lands were bought with his second son's money, whereupon the eldest son promised that his brother should enjoy them accordingly. The father dies. The Lord Keeper Wright and the Master of the Rolls held, that the eldest son was entitled to these lands, because, by the statute of frauds, there ought to have been a declaration of the use or trust in writing. But Lord Cowper was of another opinion, because of the fraud here manifest, in that the

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eldest son promised the father on his death-bed, that the other should enjoy the lands, so that he took this to be a case out of the statute.

*Sellack v. Harris*, 5 Vin. Abr. tit. *Contract*, &c. (H), p. 31.

So, where a parol building-lease was made of ground, and when the lessor was dying, he declared, he thought he ought to make a lease in writing; but the heir told him, he should not discompose himself, for that he would supply it; whereby, and by other fraudulent means, the lessee was hindered from seeing the lessor, and having the lease executed accordingly; the Lords held this to be out of the statute, and made it good to the lessee.

*Leister v. Foxcroft*, cited in *Gilb. Eq. Rep.* 11.

So, if a man has made his will, and his son executor, and when he is dying, says, that he has a mind to have his wife executrix, and the son says, "Don't trouble yourself to alter it, for I will let her have the surplus, and act as executor;" a court of equity will decree accordingly.

*Gilb. Eq. Rep. Ibid.*]

|| So, a provision in a will was increased by the court upon evidence of the testator's having declined making a new will for adding to the provision, as it was his intention to have done, upon being promised by his executor and residuary legatee, that his intention should be carried into effect without it.

*Barrow v. Greenough*, 3 Ves. 152.

Where a testator having already made a will, nevertheless, at the request of some interested persons, consented to make a fresh will, and one being prepared and presented to him for execution, he desired to be informed, whether it was the same with the former, and being told it was, he subscribed it; but it being materially different from the first, it was set aside upon evidence of these circumstances of imposition upon the testator.

*Small v. Allen*, 8 T. R. 147.||

There are likewise several other instances, where a parol agreement intended to be reduced into writing, but prevented by fraud, has been decreed in equity, notwithstanding the statute of frauds and perjuries; as, where upon a marriage-treaty instructions were given by the husband to draw a settlement, which he privately countermanded, and afterwards drew in the woman by persuasions and assurances of such settlement to marry him; it was decreed that he should make good the settlement.

*Abr. Eq.* 19, and vide tit. *Agreements*, letter (C).

So, where a parol agreement was concerning the lending of money on a mortgage, and the conveyance proposed was an absolute deed from the mortgagor, and a deed of defeasance from the mortgagee, and after the mortgagee had gotten the deed of conveyance, he refused to execute the defeasance; it was decreed against him on the point of fraud.

*Abr. Eq.* 20.

[So, where a father prevailed with his daughter and her husband to join with him in suffering a recovery for a particular purpose, and afterwards made use of it for another purpose, Lord Hardwicke relieved against it upon the ground of fraud. In this case the deed to lead the uses was general to the father and his heirs.

*Young v. Peachy*, 2 Atk. 254. See further, as to parental influence, *Cory v. Cory*, 1 Ves. 19; *Kinchant v. Kinchant*, 1 Br. Ch. Rep. 369, 374; *Heron v. Heron*, 2 Atk. 160.]

If a son and heir apparent persuades his father not to make a will which he intended to make, and which was to contain provisions for his younger

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children, promising to do for them himself; this is such a fraud, for which equity will decree the heir to give them such provisions himself.

Pr. Ch. 4, Chamberlain's case, cited to have been decreed.  $\beta$ The heir promised his mother, that if she would give him half of her estate, he would give part of his lands to his younger brother, which she agreed to; and in consequence of this, the heir executed three deeds to his brother for three several parcels of land: two of the deeds were recorded, but the third, which had been acknowledged before two witnesses only, she trusted with the heir, who promised to acknowledge it before a third witness: upon discovering that the mother had conveyed part of her property to the younger brother, he probably destroyed it. Under these circumstances equity will not set up the deed against the heir. *Chapman v. Chapman*, 4 Call, 430.

So, where tenant in tail is prevented by the issue in tail from suffering a recovery in order to provide for younger children, by his promising to do for them himself, equity will compel him to do it after his father's death.

Pr. Ch. 5 *Luttrell v. Olmuis*; 11 Ves. 638.

If a mother having a right to dower, to encourage a marriage of her son to A B releases her dower, and the release is shown to the wife and her relations, it shall bind the mother, though the release was obtained by (a) a fraudulent suggestion.

2 Vern. 133. (a) That a release shall be avoided in equity whenever there is *suppressio veri* or *suggestio falsi*. Vern. 19, 20, 31, 32.

|| Where, in order to induce the father of a young lady to consent to her marriage, a creditor suppressed the fact of his debt and the marriage was had, he was not permitted to set up the debt even against the husband, in whose favour, and at whose instance he had made the suppression.

*Neville v. Wilkinson*, 1 Br. Ch. Rep. 543. See also *Dalbiac v. Dalbiac*, 16 Ves. 116. ||

If a man charge lands in D with a portion for a daughter by a first venter, and then marries, and settles part of those lands for the jointure of a second wife, who has no notice of the charge, and A, believing that the portion would take place of the jointure, by will gives other lands in lieu thereof, and the wife combines with her son, who is heir to A, to defeat his settlement and provision on the daughter, by adhering to her jointure, and insisting that the provision on the daughter was voluntary and fraudulent as to her: and that therefore she was not bound to accept of the devise; the daughter will be relieved in equity.

Vern. 219, *Reeve v. Reeve*.

A widow makes a (b) deed of settlement of her estate, and marries a second husband, who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate, that the husband married her, the court set aside the deed as fraudulent.

2 Ch. Rep. 81, *Howard v. Hooker*.  $\beta$ *Waller v. Armstead's Admrs.*, 2 Leigh, 11; *St. George v. Wake*, 1 My. & Keen, 610. *g* (b) So, where the intended wife, the day before her marriage, entered privately into a recognisance to her brother; it was decreed to be delivered up. 2 Ch. Rep. 79.—But, where a conveyance or settlement shall be said to be fraudulent, and in derogation of the rights of marriage, vide 2 Vern. 17, and tit. *Marriage and Divorce*, D. 3, and *Gale v. Lindo*, 1 Vern. 475.  $\beta$ A secret conveyance of her property by a woman immediately before her marriage, without the knowledge of her intended husband, is a fraud upon his marital rights, and will be set aside. *Linker v. Smith*, 4 Wash. C. C. R. 224. *g*

But, where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to trustees, in trust for children by her former husband; though it was insisted, that this was without the privity of the husband, and done with the design to cheat him, yet the court thought that a widow may thus provide for her children before she puts herself

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under the power of a husband; and it being proved that 8000*l.* was thus settled, and that the husband had suppressed the deed, he was decreed to pay the whole money without directing any account.

Vern. 408, *Hunt v. Mathews*.  $\beta$  A provision for the children of a former marriage seems to be an exception to the rule, that secret and voluntary conveyances, made by a woman in contemplation of marriage, are fraudulent to the marital rights and void. *Jones v. Cole*, 2 *Bailey*, 330.*g*

$\beta$  A wife who had been deserted by her husband became entitled to a share in an intestate's property, amounting to 3609*l.* The husband, while he was ignorant of the amount of the share, assigned it in trust for his wife and children, subject to 10*s.* a week to himself for life. Although the deed recited that the intestate's estate was very considerable, yet as the administrators, who were the wife's brothers and parties to the transaction, did not disclose to the husband the amount of the share, the deed was set aside as fraudulent.

*Grouss v. Perkins*, 6 *Sim.* 576.*g*

A, failing in his trade, compounded with his creditors at so much in the pound, to be paid at the time therein mentioned; and he having failed in payment at the precise time, some of the creditors refused to stand to the agreement, of which, being under hand and seal, he brought his bill to compel a performance. But it appearing in the cause that A, to draw in the rest of the creditors, had made an under-hand agreement with some of them, who were seemingly to accept of the composition, to pay them their whole debts, which was a fraud and deceit upon the rest of the creditors, the court would not decree the agreement, nor relieve the plaintiff, but dismissed the bill.

2 *Vern.* 71, *Child v. Danbridge*.  $\beta$  The law allows a creditor to give one creditor a preference over another; but it will not allow him to secure an advantage to himself at the expense of creditors, as the price of such preference. *Smith v. Henry*, 1 *Hill*, 16. Vide ante *Assignment*, (E).*g*

So, where A being intrusted by B to receive interest on tallies, receives the principal and fails, and afterwards compounds with his creditors, but B would not come in, without having a greater composition, which A agrees to give, and A brought his bill to be relieved against this under-hand agreement; the court refused to give him any relief, he having been guilty of a breach of trust, and also a party to the fraud.

2 *Vern.* 602, *Small v. Brackley*.

|| The Court of Chancery will set aside a deed obtained by the keeper of a house of lunatics from a person residing under his care, though the party be not a lunatic at the time, on the general principle of inequality of situation, like the cases of guardian and ward, attorney and client, &c.

*Wright v. Proud*, 13 *Ves.* 136.

And so also a deed executed in favour of a person acting as agent for managing a lady's affairs, if undue influence appears.

*Huguenin v. Bazeley*, 14 *Ves.* 273.

[Where, with the consent of the wife and her trustees, and in order to a composition with the husband's creditors, the Court of Chancery ordered part of the wife's fortune to be paid to the creditors consenting to accept such composition, and to discharge the husband of the debts; and some of the creditors, upon executing the deed of composition, took private securities, post-dated, for part of their debts, besides their share with the

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other creditors; and such securities were set aside, as a fraud on the wife, the trustees, and the court.

*Middleton v. Lord Onslow*, 1 P. Wms. 768. See too *Spurrett v. Spiller*, 1 Atk. 105, S. P.  $\beta$  Conveyances of real estate by deeds of gifts to children are not fraudulent against the wife's dower, because not founded on a valuable consideration. To render them fraudulent and void as against her right of dower there must be an actual and specific intent to defraud her in making such conveyances. *McIntosh v. Ladd*, 1 Humph. 459.*g*

So, too, at law; where all the creditors of an insolvent consented to accept a composition upon an assignment of his effects by deed of trust to which they were all parties, and one of them, before he executed, obtained from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note was made; the note was adjudged void, as a fraud on the rest of the creditors, and therefore incapable of being ratified or revived by a subsequent promise.

*Cockshott v. Bennett*, 2 T. R. 763.  $\beta$  Vide ante *Assignment*, E, § 9; *Talcott v. Wilcox*, 9 Day, 134; *Swift v. Thompson*, 9 Day, 63; *Toby v. Read*, 9 Day, 216; *Clow v. Woods*, 5 S. & R. 279; *Wilt. v. Franklin*, 1 Binn. 521; *Dawes v. Cope*, 4 Binn. 258; *Cunningham v. Neville*, 10 S. & R. 201; *Babb v. Clemson*, 10 S. & R. 419; *Myers v. Harvey*, 2 Penns. 481; *Martin v. Matthiot*, 14 S. & R. 214; *Streeper v. Eckert*, 2 Whart. 302; *Hoofsmith v. Cope*, 6 Whart. 53; *Carpenter v. Mayer*, 5 Watts, 483; 2 Watts & Serg. 150; *Wright v. Hancock*, 3 Munf. 521.*g*

||On the principle of *Cockshott v. Bennett* it was held, that where a creditor obtained from an insolvent a note for his debt, signed by his debtor and a surety, on the understanding that the plaintiff, in consideration of it, was to induce the other creditors to accept five shillings in the pound, and that the security given to the plaintiff was to be kept secret, the note was fraudulent and void, and the plaintiff could not recover upon it at law.

*Wells v. Girling*, 1 Bro. & B. 447; 4 Moo. 78; and see *Jackson v. Lomas*, 4 Term R. 170; *Lancaster v. Rose*, 4 East, 381.

Proviso in a lease that lessee should not demise premises without license in writing. Parol license to underlet is insufficient; but if such license is given as a snare, and under circumstances of fraud, the court will relieve.

*Richardson v. Evans*, 3 Madd. 218.

A transaction of sale, made on a false or mistaken consideration between parties in the relation of brothers-in-law, the vendor being an heir succeeding to the estate sold, and the purchaser executor of the will of the vendor's father, and where the party selling is under circumstances of great pecuniary embarrassment and distress, will not be impeached if fairly made; but if the consideration for the purchase was the balance of an account which appears to be erroneous, the whole transaction must be so far investigated as to correct the accounts.

*McNeil v. Cahill*, 2 Bligh, 228.

Where a partner withdrawing money from partnership by entries in books, disguises the transaction, or wholly omits or conceals it, it is a fraud, and will entitle others to sue his separate estate: otherwise if done openly.

6 Madd. 2; 1 Glyn & Ja. 74.

The shareholders in a joint stock company are entitled to relief in equity, where the conduct of the directors has been fraudulent, or a violation of the terms on which the company was formed.

*Blair v. Agar*, 1 Sim. 37.

Where a tenant for life and remainder-man joined in a lease for twenty-one years to the steward of the former, in which certain common rights of



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disputed title were omitted, but in respect of which six years after, valuable allotments were made, and the reversioner afterwards accepted the rent for five years; it was held, that the lease could not, after so long acquiescence and many acts, be impeached for fraud; though, considering the relation of the parties, this transaction might have been questioned recently after.

*Selsey v. Rhodes*, 1 Bligh, N. S. 1.

Family agreements cannot be supported if founded on the mistake of either party to which the opposite party is accessary.

*Gordon v. Gordon*, 3 Swanst. 467; and see 1 Swanst. 137.

If a party, ignorant of the plain and settled principles of law, is induced to yield a portion of his indisputable right, equity will relieve; but where the title is disputable, and he enters into a compromise, no relief is given, nor will consideration be inquired into if taken on due deliberation.

*Naylor v. Winch*, 1 Sim. & Stu. 564.

If a person be fraudulently prevented from doing any act in equity, it will be considered as if that act has been done.

*Middleton v. Middleton*, 1 Jac. & W. 94.

A partner who superintended, exclusively, the accounts of the concern, agreed to purchase his co-partner's share for a sum which he knew from the accounts, which he concealed from his co-partner, to be inadequate,—the agreement was set aside.

*Maddeford v. Austwick*, 1 Sim. 89; and see 3 Swanst. 73; 2 Swanst. 287.

An agreement will not be avoided by reason that representations made by one party to the other on the subject of it were incorrect, if it be manifest that the party making the representations is speaking not from personal knowledge, but with reference to accounts which are equally open to both parties, and if the representations be justified by those accounts.

*Harris v. Kemble*, 1 Sim. 111; and see *Ibid.* 13, 63; 1 Jac. 423; 1 Jac. & W. 112.

A master, in order to make a provision for a confidential clerk after his own decease, insures his life for 3000*l.*, he paying two-thirds of the premium, and the clerk one-third, and assigns the policy to the clerk. The clerk has a liberal salary, independent of this bounty. The master dies and in his will is found a letter, stating that the assignment had been procured from him by undue influence on the part of the clerk, and evidence of declarations by the clerk that he had it in his power to ruin the credit of the house by the manner in which he kept the accounts; it was held that the assignment, as to two-thirds of the policy, was fraudulent and void.

*Collins v. Hare*, 1 Dow, Ca. N. S. 139.||

Upon the same principle where A agreed to give B a certain sum for goods in advancement of C, it was holden that a secret agreement between B and C that the latter should pay a further sum was void as a fraud upon A, and that B could not recover such further sum against A.

*Jackson v. Duchaire*, 3 T. R. 551.]

If a security be obtained from a person by fraud and practice, upon a pretence of a demand that is fictitious, it will be relieved against in equity.

2 Vern. 123, where a bill of exchange was obtained by a gross fraud, and it was relieved against with costs to be ascertained by the party's own oath.—Where a policy of insurance for insuring a life was gained by fraud, and set aside with costs both at law and in equity. 2 Vern. 206.—Where a weak man was prevailed upon by two of his relations to give a bond to one of them, to settle his estate to the use of himself in tail male, remainder to his two brothers successively in tail male, and he

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afterwards marrying, was relieved against the bond. 2 Vern. 189. [Where advantage has been taken of the weakness of parties, and conveyances therefore set aside, see *White v. Small*, 2 Ch. Ca. 103; *Clarkson v. Hanway*, 2 P. Wms. 203; *Bennet v. Vade*, 2 Atk. 324; *Evans v. Blood*, 4 Br. P. C. 557; *Bridgeman v. Green*, 2 Ves. 627; *Filmer v. Gott*, 7 Br. P. C. 70.]

As, where A having by the means of an attorney, prevailed on E, a woman, to levy a fine of some houses, and to execute a deed leaving the uses thereof to A and his heirs; it was proved that she, at the time of levying the fine, declared she must make use of some friend's name in trust; and afterwards by will declared she had levied such fine only in trust, and the better to enable her to dispose of the estate, and thereby devised it to J S and his heirs, subject to the payment of her debts; although A proved a great familiarity and friendship between them, and that she had declared he should have her estate; yet it was decreed, not only that the estate should be liable to the creditor's debts, but that A should convey the estate to the devisee and his heirs.

2 Vern. 307.

So, where A being to procure 1000*l.* for B, borrows it, and pays B only 300*l.* and takes other 300*l.* himself, and the remaining 400*l.* in goods, which prove worth little or nothing; and for securing the whole, both gave a recognisance; yet that being sued against B, he brought his bill, and had a perpetual injunction against the recognisance on payment of 300*l.* only and interest, by reason of some circumstances of fraud; it appearing to be a contrivance between A and the lender to charge B with the whole.

*Smith v. Loader*, Pr. Ch. 80; 2 Vern. 346, S. C.

Where a purchase was obtained from a man almost in his dotage, at a great under-value, who was persuaded by the persons that treated with him that they could help him to a great match, and told him, that to qualify himself for the lady, it was necessary he should convert all his lands into money, and they treated for the purchase in a person's name who knew nothing of the matter; for these circumstances of fraud, the purchase was set aside.

Vern. 206, vide Pr. Ch. 76, where, on the circumstances of a fraud, the Court of Chancery refused to carry the agreement of a feme covert into execution.—Where a purchase at a great under-value, obtained from a person who some time after became a lunatic, was set aside for a fraud. 2 Vern. 678.

β Where a guardian purchases lands of his ward soon after he comes of age, at a grossly inadequate price, the guardian having sought the purchase, and taking advantage of the imprudence and thoughtlessness of the young man, the contract will be rescinded, in a court of equity, upon a bill filed for the purpose against the guardian.

*Williams v. Powell*, 1 Ired. Eq. 460.*g*

Where an agreement for a purchase was obtained from a woman of ninety years of age, and several suspicious circumstances appeared, the court would neither decree it to be carried into execution against the heir at law, nor to be delivered up on a cross-bill for that purpose, but left the parties to their remedy at law.

2 Vern. 632, *Green v. Wood*. [See the case of *Savage v. Taylor*, Cas. temp. Talb. 234, where the court followed the same middle line of conduct.] β M, a barrister, became acquainted with a widow possessed of some property of her own, and who had large expectation from an aunt, and acquired her confidence, while engaged in the management of her affairs, he persuaded her to give him a deed of gift of a third of the aunt's property. When that property came into possession, he persuaded her to transfer

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one half of it to himself, and also the other half to be managed by him on her account. He made misrepresentations to her about her son, and also as to other matters, and prevailed upon her to execute a release to him. She at length called for an account, and offered him a full discharge if he would pay her two-thirds of the property, calculated by her at £21,000, but which he refused to do or to give her an account: held that the deed of gift and release having been obtained by undue influence and imposition should be set aside, and M be ordered to refund what should be found due upon taking the accounts. *Maccabe v. Hussey*, Dow & Clark, 440. A deed was also set aside given under the following circumstances: it purported to be a conveyance by way of sale of real estate, it was made by an aged and infirm person to his intimate friend and medical attendant, the money apparently paid at the execution of the deed having been provided by the grantor for the purpose, and the transaction having been kept secret from the household and family of the grantor. *Gibson v. Russell*, 2 Y. & C. 104.<sup>g</sup>

[The Duke and Duchess of Cleveland, being about to send Lord Southampton, their eldest son, to travel, employed one Osmond as a servant to attend upon the young lord, then an infant of about seventeen, and (as by the answer of Osmond it was admitted) *to prevent his being imposed upon*. Afterwards on the Lord Southampton's returning from abroad, Osmond was continued in his service, and, when his lordship was about twenty-seven years of age, prevailed on him to enter into a bond for the payment of 1000*l*. to him the said Osmond. The bond was prepared by Osmond, and kept secret from the duke and duchess. There were also some proofs of the weak capacity of the young lord, and that at that time he was unable to raise money to pay off the bond. Under all these circumstances the court thought the bond fraudulently obtained, and relieved against it.

*Osmond v. Fitzroy*, and, *è contra*, 3 P. Wms. 129. In giving judgment in this case, Sir J. Jekyll said, "Where a man gives a bond, if there be no fraud or breach of trust in the obtaining of it, equity will not set aside the bond only for the weakness of the obligor, if he be *compos mentis*; neither will this court measure the size of the people's understandings or incapacities, there being no such thing as an equitable incapacity, where there is a legal capacity." But in *Griffin v. Devenille*, Lord Thurlow observed, that in almost every case upon this subject, a principal ingredient was a degree of weakness short of *legal incapacity*; and in this very case of *Osmond v. Fitzroy*, no relief probably would have been given, if the court had not considered Lord Southampton as more liable to imposition than the generality of mankind. Cox's note, 3 P. Wms. 130.

A court of equity will relieve against an unequal contract entered into by a person in embarrassed circumstances; for to avail oneself of the distresses of another carries somewhat of fraud in it.

*Bosanquet v. Dashwood*, Ca. temp. Talb. 38; *Proof v. Hines*, Ibid. 111; *Heathcote v. Paignon*, 2 Br. Ch. Rep. 167. See 3 Wooddes. 457.

It will relieve, too, where there is a manifest inequality between parties arising from the relation in which they stand to each other. Such is the relation of guardian and ward; and therefore a court of equity will not allow any gift or release to a guardian from his ward on his coming of age, or give validity to any contract the terms of which are not perfectly fair and equal, made by persons in that situation, or between whom a similar confidence hath existed. Such also is the relation of parent and child, (a) attorney and client, (b) and steward or agent and his principal. (c)

*Duke Hamilton v. Mohun*, 1 P. Wms. 118; *Hylton v. Hylton*, 2 Ves. 547; *Griffin v. De Veuille*, 3 Wooddes. App. 16. (a) *Glissen v. Okeden*, 2 Atk. 258, and 3 Br. P. C. 560; *Cocking v. Pratt*, 1 Ves. 400; *Hawes v. Wyatt*, 3 Br. Ch. Rep. 156. (b) *Proof v. Hines*, Ca. temp. Talb. 111; *Walmsley v. Booth*, 2 Atk. 25; *Oldham v. Hand*, 2 Ves. 259; *Welles v. Middleton*, printed cases in the House of Lords, 1785; *Newman v. Payne*, 2 Ves. jun. 199 and 4 Br. Ch. Rep. 350. (c) *Cray v. Mansfield*, 1 Ves. 381; *Gartside v. Isherwood*, 1 Br. Ch. Rep. 558; *Fox v. Mackreth*, 2 Br. Ch. Rep. 400; *Crow v. Ballard*, 4 Br. Ch. Rep. 117; *Lord Hardwicke v. Vernon*, 4 Ves. 411; 14 Ves. 504. The principle upon which transactions between solicitor and

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client are decided, applies also to other confidential relationship; for example, where a medical attendant obtained from an aged patient an agreement to pay him 25,000*l.* after death in consideration of his past and future services, which services were continued for several years afterwards, and until the death of the patient; it was held that such an agreement was void, and the court intimated that it was void even at law, on the ground of public policy, as giving the medical attendant an interest in the death of his patient. *Dent v. Bennett*, 7 Sim. 539.*g*

For the same reason a court of equity will relieve against bargains with heirs apparent, or persons in remainder, for their expectations; so likewise, with sailors for their prize-money. (*a*)

*Berney v. Pitt*, 2 Vern. 14; *Knott v. Hill*, Ibid. 27; *Wiseman v. Beake*, Ibid. 121; *Cole v. Gibbons*, 3 P. Wms. 290; *Earl of Chesterfield v. Jansen*, 1 Atk. 342, 351, and 2 Ves. 144, 155; *Barnardiston v. Lingood*, 2 Atk. 133; *Gwyne v. Heaton*, 1 Br. Ch. Rep. 1. (*a*) *Baldwin v. Rochford*, 1 P. Wils. 229; *Taylor v. Rochford*, 2 Ves. 281; *Howe v. Weldon*, Ibid. 516.

Upon principles of public policy, a court of equity treats as fraudulent all agreements for the purchase of public offices, even though such offices should not be within the statute of 5 & 6 Edw. 6. Agreements of this kind are indeed considered in the same light in a court of law.

*Law v. Law*, Cal. temp. Talb. 140, and 3 P. Wms. 391; *Hannington v. Du Chastel*, 1 Br. Rep. 124; *Morris v. McCulloch*, Amb. 432; *Garforth v. Fearon*, 1 H. Bl. 327; *Parsons v. Freeman*, Ibid. 322.]

β An administratrix who sold real estate of decedent under a surrogate's order, in which estate she was entitled to dower, and in the terms of sale it was stated that a clear and satisfactory title would be given, and the purchaser paid the full value of the premises, under a belief he was obtaining a perfect title; it was held that by this concealment the widow lost her right to dower.

*Dongrey v. Topping*, 4 Paige, 94.

A sold lands to B, under an agreement that they should be valued by four men, two to be chosen for each; one of the valuers selected by B was his secret partner in the purchase, which fact was unknown to A; held, that this was a fraud on A, against which a court of equity would relieve.

*Haywood v. Marsh*, 6 Yerg. 69. See 6 Yerg. 108.

A judgment at law, obtained by fraud, may be set aside in Chancery. *Collier v. Easton*, 2 Missouri R. 145.

But such judgment is not absolutely void, and all acts performed under it are valid as to third persons.

*Simms v. Slacum*, 3 Cranch, 306.

Fraud in the consideration of a sale can be relieved only in equity, except where the conveyance is avoided by the statute.

*Logan v. Simmons*, 1 Dev. & Bat. 13; *Dale v. Roosevelt*, 9 Cowen, 307.

A sale of goods made by a merchant to a man in insolvent circumstances, which fact is fraudulently concealed from the seller, when the purchaser at the time did not intend to pay for such goods, or bought them for the purpose of assigning them to confidential creditors, will be set aside as fraudulent.

*Lupin v. Marie*, 2 Paige, 169.

A promissory note, obtained by fraudulent practices, will be relieved against in equity, (*b*) and equity will relieve from a promissory note given in order to regain possession of slaves that the payer had concealed, and refused to inform the owner where they were until he gave the note. (*c*)

(*b*) *Bennett v. Beardsley*, 1 Day, 170. (*c*) *Allcorn v. Rafferty*, 4 J. J. Marsh. 220 *g*

(C) Of fraudulent Conveyances to defeat Creditors and Purchasers within the 13 Eliz. c. 5, and 27 Eliz. c. 4.

It seems by the common law, if a man had right and title to a thing, or a just debt owing to him, he might avoid any fraudulent conveyance made to deceive him of that right or debt; as, if a man had a right to goods, and he that had them, sold them by covin in a market-overt, to alter the property of them; or if one passed away goods to deceive a creditor; these acts might have been set aside. But, if the gift were precedent to the right or debt, there was no way in such case to set aside the conveyance.

3 Co. 83; Moore, 638; Dyer, 295; Co. Lit. 76 a, 290 a, b; Lane, 105; Cr. El. 444. [The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes of 13 El. c. 5, and 27 El. c. 4. *Per* Lord Mansfield, Cowp. 434.] || And it has been said, that a deed cannot be fraudulent, unless it is fraudulent both at law and in equity, that the question of fraud is the same in the one court and in the other. But to this doctrine Lord Eldon does not agree; for the clear doctrine of Lord Hardwicke and all his predecessors was, that there are many instances of fraud, that will affect instruments in equity, of which the law cannot take notice. 1 V. & B. 98.||

But now by the 13 Eliz. c. 5, “for the avoiding and abolishing of feigned, covenous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore; which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

|| Made perpetual by 29 El. c. 5. || *β* The principles contained in statutes 13 Eliz. c. 5, 27 Eliz. c. 4, and Hen. 7, c. 4, have been copied from the civil law. Dig. 42, 8, 5, 11; Bell’s Com. 182, 5th ed. Though not substantially re-enacted in the United States, those principles generally prevail. 3 Johns. Ch. 481; 1 Halst. 450; 5 Cowen, 87; 8 Wheat. 229; 11 Wheat. 199; 12 S. & R. 448; 4 Greenl. 52; 2 Pick. 411.*g*

“It is therefore *declared*, ordained, and enacted, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution at any time had or made sithence the beginning of the queen’s majesty’s reign that now is, or at any time hereafter to be had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devices and practices, as is afore-said, are, shall or might be in anywise disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, fained consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.”

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§ 5. "Provided that this act, or any thing therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made, conveyed, or assured, or hereafter to be had, made, conveyed, or assured, which estate or interest is or shall be upon good consideration and *bonâ fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance, or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion, as is aforesaid."

And by the 27 Eliz. c. 4, made perpetual by 39 El. c. 18. "Forasmuch as not only the queen's most excellent majesty, but also divers of her highness' good and loving subjects, and bodies politic and corporate, after conveyances obtained or to be obtained, and purchases made or to be made of lands, tenements, leases, estates, and hereditaments for money or other good considerations, may have, incur, and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses heretofore made, or hereafter to be made, of, in, or out of lands, tenements, or hereditaments so purchased or to be purchased, which said gifts, grants, charges, estates, uses, and conveyances were or hereafter shall be meant or intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same; or else by the secret intent of the parties the same be to their own proper use, and at their free disposition, coloured nevertheless by a fained countenance and show of words and sentences, as though the same were made *bonâ fide*, for good causes, and upon just and lawful considerations:

§ 2. "For remedy of which inconveniences and for the avoiding of such fraudulent, fained, and covinous conveyances, gifts, grants, charges, uses, and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements, and hereditaments, it is ordained and enacted, That all and every conveyance, grant, charge, lease, estate, encumbrance, and limitation of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever, had or made any time heretofore sithence the beginning of the queen's majesty's reign that now is, or at any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased, or shall afterwards purchase in fee-simple, fee-tail, for life, lives, or years, the same lands, tenements and hereditaments, or any part or parcel thereof so formerly conveyed, granted, leased, charged, encumbered, or limited in use, or to defraud and deceive such as have, or shall purchase any rent, profit, or commodity, in or out of the same, or any part thereof, shall be deemed and taken only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person and persons lawfully having or claiming, by, from, or under them, or any of them, which have purchased, or shall hereafter so purchase for money, or other good consideration, the same lands, tenements, or hereditaments, or other part or parcel thereof, or any rent, profit, or commodity, in or out of the same, to be utterly void, frustrate, and of none effect: any pretence, colour, fained consideration, or expressing of any use or uses to the contrary notwithstanding.

§ 3. "Provided that this act, or any thing therein contained, shall not extend or be construed to impeach, defeat, make void, or frustrate any con-

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veyance, assignment of lease, assurance, grant, charge, lease, estate, interest, or limitation of use or uses of, in, to, or out of any lands, tenements, or hereditaments heretofore at any time had or made, or hereafter to be had or made upon or for good consideration, and *bonâ fide*, to any person or persons, bodies politic or corporate; any thing before mentioned to the contrary hereof notwithstanding."

And by § 4, it is further enacted, "That if any person or persons have heretofore sithence the beginning of the queen's majesty's reign, that now is, made or hereafter shall make any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause, provision, article, or condition of revocation, determination, or alteration, at his or their will or pleasure, of such conveyances, assurance, grants, limitations of uses, or estates of, in, or out of the said lands, tenements, or hereditaments, or of, in, or out of any part or parcel of them contained or mentioned in any writing, deed, or indenture of such assurance, conveyance, grant, or gift, and after such conveyance, grant, gift, demise, charge, limitation of uses, or assurance so made or had, shall or do bargain, sell, demise, grant, convey, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic or corporate, for money or other good consideration paid or given, (the said first conveyance, assurance, gift, grant, demise, charge, or limitation, not by him or them revoked, made void, or altered, according to the power and authority reserved or expressed unto him or them, in and by the said secret conveyance, assurance, gift, or grant,) that then the said former conveyance, assurance, gift, demise, and grant, as touching the said lands, tenements, and hereditaments so after bargained, sold, conveyed, demised, or charged against the said bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, and assigns, and against all and every person and persons which have, shall, or may lawfully claim any thing by, from, or under them, or any of them, shall be deemed, taken, and adjudged to be void, frustrate, and of none effect, by virtue and force of this present act. Provided nevertheless, That no lawful mortgage made, or to be made *bonâ fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this act, but shall stand in the like force and effect as the same should have done if this act had never been had nor made."

[Although the statute of 13 Eliz. c. 5, subjects the parties to the frauds, which it provides against, to certain penalties, and therefore, it should seem, ought to be construed strictly; yet Lord Mansfield observed, that the statutes of 13 & 27 El. cannot receive too liberal a construction, or be too much extended in suppression of fraud.

Cowp. 434.]

In the construction of these statutes the following opinions have been holden:

That where in a *formedon* the tenant pleaded non-tenure upon which they were at issue; and it was found, that before the writ purchased, the tenant enfeoffed divers persons, with an intent to defraud him who had cause of action to the lands, and that notwithstanding the feoffor took the profits; on this verdict it was adjudged for the demandant, viz., "that by the 13 Eliz. c. 5, the feoffment was void against him."

Crc. Eliz. 243, Leonard v. Bacon.

A being indebted to B in 400*l.* and to C. in 200*l.*, C brings debt against

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him, and, pending the writ, A being possessed of goods and chattels to the value of 300*l.* makes a secret conveyance of them all, without exception, to B in satisfaction of his debt, but notwithstanding keeps in possession of them, and sells some of them; and others of them, being sheep, he sets his mark on. It was resolved to be a fraudulent gift and sale within the 13 Eliz. c. 5; for though such a sale hath one of the qualifications required by the statute, being made to a creditor for his just debt, and, consequently, on a valuable consideration; yet it wants the other; for the owner's continuing in possession is a fixed and undoubted character of a fraudulent conveyance, because the possession is the only *indiciu*m of the property of a chattel, and therefore this sale is not made *bonâ fide*. And as this is a leading resolution, being agreeable to the rule of commerce settled by the statute, so it is highly conformable to the most exact reason and equity; for if such collusion and practice were allowed between a debtor and his creditor, as it would prove injurious to other creditors of the same debtor, in depriving them of all means of satisfying themselves by the stated methods of justice; so it must in its consequences have a very ill influence on commerce, by preventing loans of money, and other confidences of that nature, which are so necessary for the support of it, since no man would lend or trust another with money or goods upon such an apparent hazard of losing them.

3 Co. 80; Twine's case, Moore, 638; 2 Bulst. 226, S. C. [See too Worsley v. De Mattos, 1 Burr. 467.]  $\beta$  But a deed will not be deemed fraudulent in law, as it respects creditors, if the grantor have other estates which may be obtained, sufficient to satisfy the debt. Drinkwater v. Drinkwater, 4 Mass. 354; Reading of Judge v. Trowbridge, 3 Mass. 573.*g*

So, where A being indebted to five several persons in the sums of 20*l.* each, and having goods to the value of 20*l.* makes a gift of them to one of the five, in satisfaction of his debt; but upon this secret trust between them, that the grantee, in compassion to his circumstances, should deal favourably with him in permitting him, or some other for him, to use and possess the said goods, paying this creditor as he was able and could afford it, the said debt of 20*l.*, it was resolved to be a fraudulent conveyance and deed of sale.

3 Co. 81; Moore, 639.

So, if A makes a bill of sale of all his goods in consideration of blood and natural affection to his son, or one of his relations, it is a void conveyance in respect to creditors, for the considerations of blood, &c., which are made the motives of this gift, are esteemed in their nature inferior to valuable considerations, which are necessarily required in such sales by 13 Eliz. c. 5. And this seems to be a construction suitable to the strictest rules of equity; for if considerations of blood or natural affection were allowed to be of equal dignity with, or to come under the notion of valuable considerations required by this statute, it would be in the power of any debtor, by such conveyances of his personal estate to his kindred, to build a family upon a conduct to his creditors, which carries in it all the stains of injustice and collusive dealing. Moreover, there is a strong presumption that such sales to relations are constantly attended with a secret trust and personal confidence of reconveying part of the goods to the vendor for his subsistence; so that they are entirely inconsistent with the scheme laid down by the statute, and therefore illegal and void.

2 Ro. Abr. 779; Palm. 214; 3 Co. 81;  $\beta$  Parker v. Proctor, 9 Mass. 390; Bennett v. The President, &c., of the Bedford Bank, 11 Mass. 421.*g*



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|| A testator by his will gave 6000*l.* to trustees upon trust to pay the interest to S C for her life for her separate use, and afterwards to pay the same among her children. S C filed her bill against the testator's widow and J S the executors, praying to have the 6000*l.* secured. In 1736, an account was directed to be taken of the personal estate. In 1745, J S the executor was, by an order of the court, committed to the Fleet prison, for non-payment into the bank of the sum of 3000*l.*, part of the estate of the testator in his hands, where he remained till his death in 1750; and the cause was revived against Gopp and Edwards, whom J S had made his executors. On the 4th April, 1753, the master reported a considerable balance due from the estate of J S to that of the testator; and it having been discovered that J S had advanced to his children divers sums of money, and the testator's estate proving insufficient to pay the legacies, and J S having died insolvent, a supplemental bill was filed against Gopp, who had married one of the daughters of J S since deceased; Elizabeth Edwards, widow, another of the daughters since deceased; and against Sarah and Catharine, unmarried daughters of J S, for a discovery of the money so advanced, and to have it refunded. Gopp by his answer admitted that J S had given him, in 1744, on the day of his marriage, 500*l.*, as a portion with his wife, which he said was in pursuance of an agreement before marriage. The other married daughter of J S made the same defence. Sarah and Catharine confessed, that, in 1743, J S had made each of them a free gift of 500*l.* for their maintenance and subsistence in the world. And they all denied knowledge of the bad circumstances of J S at the time he advanced the money. It was insisted for the plaintiffs, that these were fraudulent gifts within the 13 Eliz., c. 5. For the defendants it was argued, that they were not fraudulent, because there was no secret trust, and they might be considered as payment of debts of nature. As to the married daughters, Lord Northington held, there was a good consideration, and dismissed the bill as to them. With respect to the other children, he observed, it had struck him at first as a hardship to make them refund; especially, as such a gift could not be considered as a trust for the giver. But on consideration he thought that no man has such a power over his own property, as that he can dispose of it so as to defeat his creditors, unless for good consideration and *bonâ fide*: that it is the motive of the giver, not the knowledge of the acceptor, that is to weigh: that the statute extends to all cases, except where there is good consideration and *bonâ fides*; and that blood had been held not to be a good consideration: that an alienation cannot be made *bonâ fide* and voluntarily, where a man, as in this case, is largely indebted at the time; for every man ought to be just before he is generous: that he had no doubt but that the voluntary gift proceeded from affection getting the better of justice; and lastly, that it was done secretly and *pendente lite*.

Partidge v. Gopp, Ambl. 596; 1 Eden, 163, S. C.

The Duke of Wharton having, upon the ground that the public good was advanced by the encouragement of learning and the polite arts, and from being pleased with the attempts of Dr. Young, granted him an annuity of 100*l.*, and afterwards by indenture reciting that there was an arrear of the annuity, and that Dr. Young had, at the Duke's request, quitted a service in the family of the Earl of Exeter, and thereby lost an annuity, granted him a farther annuity of 100*l.*, and charged his estate with both the annuities; Lord Hardwicke held (as against creditors) that the advancement of learning, though a good inducement, was not a valuable consideration, but that

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the quitting of Lord Exeter's service was a valuable consideration, and that the forbearance to sue for the arrears of the first annuity was also a valuable consideration, in respect whereof it ceased to be a voluntary grant.

*Stiles v. Attorney-General*, 2 Atk. 152. In *Jamieson v. Skipwith*, 2 Br. Ch. Rep. 34, it was taken for granted, that an engagement by a pupil to his teacher, as a remuneration of gratitude, was not valid as against creditors.  $\beta$  If any thing valuable passes between the parties the transaction is a purchase. *Jackson v. Peek*, 4 Wend. 300.*g*

A, seised in fee of an advowson, except the next presentation, which B had under the same title, in consideration of natural love and affection conveyed the advowson in fee to his son. Upon a vacancy, C claiming title to the advowson, contested the next presentation against B in a *quare impedit*. A B and C entered into a compromise upon the terms that C should release his claims to A and B according to their respective interests, and that A should convey to C the then next following presentation, which he did. It was holden, that the grant of that presentation was a conveyance for a valuable consideration, and was paramount to the grant made to the son of A.

*Hill v. Bp. of Exeter*, 2 Taunt. 69.||

$\beta$  A woman conveyed her land to a man in contemplation of marriage between them, and without any other consideration; the marriage took place, but was void in consequence of the man having a former wife then living. He then reconveyed the lands to the woman. Held, that the reconveyance was not void in favour of creditors.

*Forbush v. Willard*, 16 Pick. 42.*g*

But, if a person, before he contracts any debts, makes a voluntary settlement on his son *bonâ fide*, it seems that this is not within the statute,<sup>(a)</sup> for it never could be the intent of the act to set aside all voluntary settlements. But, if the gift be made on any trust either expressed or implied, between donor and donee, it is within the statute; for all acts for the suppressing of fraud are to be liberally expounded.

Mod. 119; [1 Ventr. 194; 1 Sid. 349; 2 Ro. Rep. 306.] (a) "If there be," saith Lord Hardwicke, "a voluntary conveyance of real estate or chattel interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appear, that will make it void." *Townsend v. Windham*, 2 Ves. 11; *Russel v. Hammond*, 1 Atk. 15; *Stileman v. Ashdown*, 2 Atk. 493. However, in the case of *Jones v. Marsh*, Ca. temp. Talb. 64;  $\beta$  *Ridgway v. Underwood*, 4 Wash. C. C. R. 129.*g* Lord Talbot declined giving any opinion how far a family settlement, without any consideration, would be fraudulent against subsequent creditors though the party was not indebted at the time; and in *Hungerford v. Earle*, 2 Vern. 261, Hutchins, Lord Commissioner, held such settlement to be void. It is observed, however, that Lord Talbot was not, by the circumstances of the case before him, called upon to give his opinion; and that the opinion of Hutchins was evidently influenced by the provisions of the settlement not having been pursued. Fonbl. Eq. Tr. 263, note. || And it is now clearly settled, that a voluntary settlement in favour even of *strangers* by one *not indebted at the time*, that is, not in *insolvent circumstances*, (for a single debt, and, as it would seem, the running debts of a man for the common bills for his house, will not do,) and meaning no fraud, is good against subsequent creditors. *Stephens v. Olive*, 2 Br. Ch. Rep. 90; *Lush v. Wilkinson*, 5 Ves. 384; *Kidney v. Coussmaker*, 12 Ves. 155, and *Montague v. Sandwich*, there cited. *Holloway v. Millard*, 1 Madd. 414; *Battersbee v. Farrington*, 1 Swanst. 106; *Walker v. Burroughs*, 1 Atk. 93; *East India Company v. Clavell*, Gilb. Eq. Rep. 37.||  $\beta$  But a deed fraudulent as to creditors cannot be avoided by a creditor the consideration of whose claim is illegal. *Alexander v. Gould*, 1 Mass. 165.*g*

And therefore if the jury find that the owner continued in possession of his goods after his bill of sale of them, this is an undoubted badge of a

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fraudulent conveyance, because the possession is the only *indicium* of the property of a chattel, which is a thing unfixed and transitory. So, there are other marks and characters of fraud, as a general conveyance of them all without any exception; for it is hardly to be presumed that a man will strip himself entirely of all his personal property, not excepting his bedding and wearing apparel, unless there were some secret correspondence and good understanding settled between him and the vendee for a private occupancy of all or some part of the goods for his support. Also, a secret manner of transacting such bill of sale, and unusual clauses in it, as that it is made honestly, truly, and *bonâ fide*, are marks of fraud and collusion; for such an artful and forced dress and appearance give a suspicion and jealousy of some defect varnished over with it.

3 Co. 81; Moore, 638.

[A being indebted, by settlement before marriage, in consideration of the marriage, and of 10,000*l.* the wife's fortune, (which was supposed to be more than the amount of his debts at that time,) conveys all his real estate and household goods (his real estate alone not being thought an adequate settlement) in trust for himself for life, remainder to his wife for life, remainder to his first and other sons in strict settlement: the wife being a ward of Chancery, the settlement was approved of by a master, and the goods enumerated in a schedule. A, after the marriage, continued in possession of the goods; after which a creditor, *at the time of the settlement*, having obtained judgment, took them in execution, whereupon the trustees commenced an action against him. It was holden, that the settlement was good against creditors; that possession was no circumstance of fraud in this case, for that it was part of the trust that the goods should continue in the house. But, if the settler had let the house and furniture, reserving one rent for the house, and another for the furniture: or, if the rent could be apportioned, the creditors would be entitled to the share of such rent reserved, or to such apportionment of it in respect of the goods. And there having been a sale of part in this case, it was agreed, that the value should be vested in the funds on the trusts of the settlement, and the interest during A's life paid to the defendant. The rest of the goods were ordered to be delivered to the plaintiffs.

Cadogan v. Kennet, Cowp. 432.]

|| Where pictures and other property at Wendover Castle, belonging to Lord Arundel, were, in consideration of Lady Arundel's relinquishing some interest under a settlement in favour of Lord Arundel, assigned to trustees for the separate use of Lady Arundel, and they continued in the possession of Lord Arundel without any inventory; in an action against the sheriff for a false return, it was left to the jury whether the trust deeds were a contrivance to defraud Lord Arundel's creditors; or whether they were a *bonâ fide* transaction; and a verdict being found in favour of the transaction, a new trial was granted, in order to bring that point more distinctly before the jury; the opinion of the court, however, evidently being, that the possession of the husband being consistent with the object of the deeds, was not of itself sufficient to annul the transaction, so as to render the goods liable to an execution at the suit of Lord Arundel's creditors. The jury, upon the second trial, found a verdict for the creditor, upon which application was made for an injunction, and the Lord Chancellor expressed his opinion very fully in favour of the general nature of the transaction, and directed a trial in the Court of Common Pleas

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for the purpose of settling the question. But of the ultimate event of the case there is no report.

*Deane v. Bayntun*, 6 East, 257; *Lady Arundel v. Phipps*, 10 Ves. 139.

Where a person assigned his effects to trustees, and the son, in order to accommodate his mother, became the purchaser of the household goods at a fair appraisement, and suffered the greater part of them to remain in the house with his mother, who continued to reside there, and take lodgers as before; it being found by the jury, that the change of property was notorious, and that the assignment was not executed with an intent to defeat either the general body of creditors, or any particular creditor; the title of the son was sustained against a subsequent execution by a creditor of the father.

*Leonard v. Baker*, 1 M. & S. 251. See also *Meggitt v. Mills*, 1 Ld. Raym. 286; *Reed v. Blades*, 5 Taunt. 212.

A *fieri facias* having issued against A, his furniture was taken and put up to sale by the sheriff, and B, his brother-in-law, became the purchaser, and a bill of sale was made out to B, dated the 13th of November, 1798; nevertheless A was permitted by B to continue in possession of the goods, in order that he might be able to carry on his business; but, being soon after arrested and committed to prison, he executed a bill of sale of the same goods, dated the 11th of March, 1799, to the defendant, to whom he was indebted in the sum of 15*l.* 5*s.* The defendant, having taken possession according to the last bill of sale, received a notice from B not to dispose of the goods, stating his prior title. On the 14th of March, the landlord of the premises authorized the defendant to distrain for 12*l.* 10*s.* for rent due from A for two quarters, which the defendant paid, and on the 26th of the same month sold the goods for 26*l.* 14*s.* 6*d.* The expenses of the bill of sale to the defendant, of keeping possession, and of the auction, added to the rent advanced by the defendant, amounted to 26*l.* 4*s.* 8*d.*, leaving a balance in the hands of the defendant of 9*s.* 8*d.*; and to recover the produce of this sale, after deducting the amount of the rent paid to the landlord, B brought his action; and the jury being directed by Lord Eldon, C. J., to consider whether the plaintiff had purchased the goods for the purpose of defeating any execution by the rest of the creditors of A, were of opinion that the purchase was not made with that view, and gave a verdict for the plaintiff. A motion was made to set aside the verdict, on the ground, that the first bill of sale, not being followed by the possession, was, according to the doctrine of *Bamford v. Baron*, 2 T. R. 594, and *Edwards v. Harben*, 2 T. R. 587, fraudulent: but the court were unanimous in supporting the verdict. And Lord Eldon said, that the plaintiff was not a creditor of A, and did not buy the goods as a means of satisfying any debt of his own; nor indeed could he so do, for the sheriff was to receive the money produced by the sale; nor was the purchase made with a view to defeat creditors, but out of mere kindness to A, to whom the plaintiff was related: that it seemed to him that this did not fall within the principle of *Twyne's case*, and the other cases, where the parties stood in the relation of debtor and creditor, and where it was their intention to defeat the other creditors: that it appeared to him to be a *new case*; for that the goods were purchased at a public sale by a person who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honest purpose: that if the plaintiff had lent the money to A to purchase these goods, and had then taken a conveyance of them as a security for his debt, arising out

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of the mere act of lending the money, leaving A in possession of the goods, that would not have been a fraudulent act, as in Bull. N. P. 258, where Mr. J. Buller, after stating the case of a conveyance, which was holden to be fraudulent, because the donor continued in possession, adds, that "the donor's continuing in possession is not in all cases a mark of fraud, as, where a donor lends his donee money to buy goods, and at the same time takes a bill of sale from him for securing the money:" that it would be difficult to distinguish the transaction in question from that case, except indeed in the circumstance of the public sale by the sheriff, which certainly was a distinction in the plaintiff's favour; and that it had appeared to him at the trial, that the plaintiff might be considered as the donor of these goods, or as lending money to A, to purchase them through the medium of the sheriff, and taking a bill of sale as a security for the money, which way of considering it would make it the very case put in Mr. J. Buller's *Nisi Prius*.

*Kidd v. Rawlinson*, 2 Bos. & Pull. 59. ||  $\beta$ A signed note as surety for B payable to C; and B, in order to secure A for becoming his surety, gave him an absolute bill of a chaise, then in the possession of a third person, and of some other property in the possession of B; the whole was left in the same situation as before, no actual delivery or change of possession being made, except that notice of the transfer of the property to A was given to the person holding the chaise, and he agreed to keep it for A. Afterwards the chaise was seized and taken away on an execution in favour of a creditor of B, and A took it from the possession of the officer. In an action of trespass brought by the officer against A for the chaise, it was held, 1st. That although the note in which A had become surety might be usurious and void, yet he was entitled to hold the property assigned to him for his security, until he was indemnified and relieved from the note. 2dly. That there was a sufficient delivery and change of property against the creditors of B. 3dly. That the fact of a part of the property being suffered to remain in the possession of the vendor, did not defeat the right of the vendee as to the residue, unless the transaction was fraudulent in fact. 4thly. That the jury were the proper judges, whether from all the circumstances of the case, the sale was merely colourable and made to defeat the rights of creditors, or it was fair and *bonâ fide*. *Spalding v. Austin*, 2 Vern. 555.g

$\beta$ A leased a farm and certain cattle to B, and it was agreed that B should deliver to A half of the produce of the farm, and half of the increase of the cattle, and at the expiration of the term, deliver A cattle of equal value. B having continued on the farm for several years, and become indebted to A, sold to the latter all his interest in the cattle on the farm, to pay the debts, and agreed to manage the farm for the future as the servant of A. This sale and agreement were made and agreed to be kept secret, lest B's creditors should become alarmed, and B continued on the farm as before; held, that B's possession of the property in this manner after the sale was conclusive evidence of a secret trust attending the sale which rendered it void as to creditors.

*Trask v. Bowers*, 4 N. H. Rep. 309.

The fact that the vendor retains possession of the chattels sold, after an absolute sale, is not conclusive but only *primâ facie* evidence that the sale was fraudulent.

*Terry v. Belcher*, 1 Bailey, 568. See *Smith v. Henry*, 1 Hill, 16; *Young v. Pate*, 4 Yerg. 164; 1 Cranch, 309; 3 Cranch, 75; 1 Gallis. 419; 1 Pet. 449; 4 Mason, 312.

A verbal condition annexed to a verbal sale of a chattel, that the property shall not vest in the purchaser until the purchase-money shall have been paid is valid, although the sale is accompanied by a delivery of the chattel, nor is the possession of the vendee, *per se*, evidence of fraud.

*Reeves v. Harris*, 1 Bailey, 563.g

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[Where there had been a decree in the Court of Chancery and a sequestration; and a person, with knowledge of the decree, bought the house and goods belonging to the defendant, and gave a full price for them; yet the court said, that the purchase being with a manifest view to defeat the creditor, was fraudulent; and therefore, notwithstanding a valuable consideration, void. So, if a man knows of a judgment and execution, and with a view to defeat it purchases the debtor's goods, it is void; because the purpose is iniquitous. For if a transaction be not *bonâ fide*, the circumstance of its being done for a *valuable consideration* will not alone take it out of the statute.

Cowp. 434.]

If a gift be made to deceive one creditor, it is void against all creditors; but wherever a conveyance is construed fraudulent, it must be with respect to real creditors and purchasers for valuable consideration.

5 Co. 60; Moore, 615.  $\beta$  Actual fraud in the conveyance of property may be shown by a creditor although his debt accrued subsequently to the conveyance sought to be avoided. *Wadsworth v. Havens*, 3 Wend. 411. And although the plaintiff had a mere right of action, as an action for a breach of promise of marriage. *Lowry v. Pinson*, 2 Bailey, 324. See *Hoke v. Henderson*, 3 Dev. 12; *O'Daniel v. Crawford*, 4 Dev. 197; *Hey v. Niswanger*, 1 M'Cord's Ch. 521; *Doyle v. Sleeper*, 1 Dana, 532; *Brown v. McDonald*, 1 Hill's Ch. 303.*g*

Therefore, if a man makes a fraudulent lease, and then another *bonâ fide*, without rent or fine, the second lessee shall not avoid the first lease; for no purchaser shall avoid a former fraudulent conveyance, but a purchaser for valuable consideration.

And. 233; Moore, 602. [See *acc.* 3 Co. 83 a; Cro. El. 444; *Doe v. Routledge*, Cowp. 785.]

$\beta$  A sale of lands made for the purpose of defeating the recovery of damages for a breach of promise of marriage, when the intent is known to the purchaser, is fraudulent and void.

*Lowry v. Pinson*, 2 Bailey, 324.*g*

But though a purchaser for a valuable consideration within the 27 Eliz. c. 4, hath notice of a fraudulent conveyance before he purchases, yet after the purchase he shall avoid it; for the statute expressly avoids such conveyances, so that whether the purchaser hath notice of them, or not, is not material.

*Gooche's case*, 5 Co. 60; Moore, 615.  $\beta$  A sale made by a fraudulent purchaser of lands, to another *bonâ fide*, for a valuable consideration and without notice, is purged of the fraud. *Gore v. Brazer*, 3 Mass. 541; *The Inhabitants of Worcester v. Eaton*, 11 Mass. 368; *Hills v. Elliott*, 12 Mass. 26; *Dexter v. Harris*, 2 Mason, 531; *Bean v. Smith*, 2 Mason, 252; *Catheart v. Robinson*, 5 Peters, 264.*g*

$\beta$  A fraudulent conveyance from A to B and C, is defeated by a subsequent *bonâ fide* conveyance from A to B.

*Doe d. Tunstall v. Botterill*, 2 Nev. & Man. 64.*g*

[So, where one, *after marriage*, made a settlement of an estate upon himself for life, remainder to his wife for life, remainder to their issue in tail; and three years afterwards mortgaged the estate to B, who was apprized of the settlement; it was holden, that the settlement was void as against the mortgagee within the statute of 27 Eliz. c. 4; and the settlement being made void by the statute, notice could make no difference.

*Chapman v. Emery*, Cowp. 278.]  $\beta$  A conveyance by the husband of the whole of his property to trustee for the benefit of his wife and his issue, is a voluntary conveyance; and it is holden by the English courts to be absolutely void under the

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27 Eliz. against a subsequent purchaser, although he had notice of it. *Cathcart v. Robinson*, 5 Pet. 264.*g*

β A post-nuptial voluntary settlement upon his wife, made by a man who was not indebted at the time, is valid against subsequent creditors.

*Sexton v. Wheaton*, 8 Wheat. 229.

The wife is a purchaser under a marriage contract executed, and the contract is valid although the husband was indebted at the time.

*Magniae v. Thompson*, 1 Baldw. C. C. R. 353.*g*

|| So, a voluntary settlement of lands made in consideration of natural love and affection was adjudged to be void as against a purchaser for a valuable consideration, though with notice of the prior settlement before all the purchase-money was paid or the deeds were executed; and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction; for the law infers fraud in this case upon the construction of the st. 27 Eliz.

*Doe v. Manning*, 9 East, 5; *Evelyn v. Templar*, 2 Br. Ch. Rep. 148. In *Doe v. Martyr*, 1 N. R. 335, *Mansfield, C. J.*, expressed his regret, that it had ever been decided, that even notice of the prior settlement would not defeat such a purchase.

And a pure voluntary settlement in favour of relations, and without fraud, being void by the statute against a purchaser, whether with or without notice, the contract for sale, no actual conveyance being executed, will be enforced against the parties having the legal interest under that settlement. For if, as it has been holden, even before any third person has acquired an interest in the property so voluntarily settled, and when the matter rests entirely between the grantor and grantee, the latter has no equity to prevent the former from defeating the grant by a sale of the estate; it would be too much to say, that he has an equity after the sale is contracted for, and after a third person has acquired an interest in it, to prevent that third person from obtaining the benefit of the contract, which the court would not restrain the settlor himself from entering into.

*Buckle v. Mitchell*, 18 Ves. 100; β *Hudnall v. Wilder*, 4 M'Cord, 294; *Geiger v. Welsh*, 1 Rawle, 349; *g* *Pulvertoft v. Pulvertoft*, 18 Ves. 84. ||

If A brings an action against B for lying with his wife, after which B assigns his estate to trustees in trust to pay the several debts mentioned in a schedule, and such other debts as he should mention within ten days, and A recovers 5000*l.* damage, and brings his bill to set aside this deed as fraudulent, and made to defeat him of his recovery; in this case A can have no other relief but to come in upon the surplus, after the debts mentioned in the schedule, or appointed within ten days pursuant to it, are satisfied: the deed being fraudulent neither in law nor equity, A being no creditor at the time of executing it; and it was conscientious in him to prefer his real creditors to one, whose debt, when recovered, was founded only *in maleficio*.

*Lewkner v. Freeman*, Pr. Ch. 105; 1 Eq. Ca. Abr. 149, pl. 5, S. C.; β 3 Dev. 12; 4 Dev. 197.*g*

A, by bill of sale, made over his goods to a trustee for B, who lived with him as his wife, and was so reputed, and he also purchased a lease of the house wherein he dwelt, in the name of a trustee, and declared the trust thereof to himself for life, then in trust for B during the residue of the term; this bill of sale was holden fraudulent as to creditors; but as to the declaration of the trust of the term, the court held it good, and not liable to A's debts, the term being never in him, and being so settled at the

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time it was purchased; and A might have given the money to B, who might have purchased it for herself, and in her own name.

2 Vern. 490, Fletcher v. Lady Lidley.

Fraudulent conveyances and gifts are only void against purchasers and creditors, and shall bind the parties themselves, and their representatives.

Cro. Ja. 270; vide 2 And. 172; [Franklin v. Thornebury, 1 Vern. 132; Villers v. Beaumont, Ibid. 100; Bale v. Newton, Ibid. 464; Clavering v. Clavering, 2 Vern. 473; Boughton v. Boughton, 1 Atk. 325, *acc.*, and if there be two or more voluntary conveyances, the first shall prevail unless the latter be for payment of debts. 1 Ch. Rep. 99.]  $\beta$  An administrator cannot avoid the deed of his intestate by showing the same to have been made to defraud the creditors of the intestate, though there be no other fund from which the debts can be paid. Adm'r. of Martin v. Martin, 1 Verm. 91.*g*

And therefore where A made a fraudulent sale of his goods to B, and delivered possession of some of them in his lifetime, and the rest came to the hands of his administrator, it was holden in an action brought by B for those goods, that the administrator could not plead the statute of 13 Eliz. c. 5, nor maintain the possession of the goods even to satisfy creditors.

Hawes and Loader, Yelv. 196; Cro. Ja. 270, S. C.

But, if a man makes a deed of gift of his goods in his lifetime, by covin, to oust his creditors of their debts; yet after his death the vendee shall be (a) charged for them.

13 H. 4, 4 b; Ro. Abr. 549. (a) As an executor of his own wrong. Yelv. 197; Cro. Ja. 271. [See too Edwards v. Harben, 2 T. R. 587, and *supra*, 444.]

$\beta$  Where a man made a conveyance of his farm to his son, in consideration of the son's bond to support him during his life, and he retained in his hands personal property to a greater amount than the debts he owed at the time; there being no other proof of fraud, this conveyance was held good although some of the property was exempt from attachment, and although after his decease his estate proved insolvent, in consequence of the charges of administration, and of the sum allowed to the widow by the judge of probate.

Usher v. Hazeltine, 5 Greenl. 471.*g*

Where by special verdict it was found, that A being possessed of divers goods to the value of 250*l.*, by covin to defraud his creditors made a gift of his goods to his daughter, upon condition, that upon payment of 20*s.* it should be void, and died; and that J S intermeddled with the goods; after which the daughter took possession of them by force of the gift, and then administration was granted to J S of all the goods, &c., of A; in an action against him as executor, it was holden, that the gift was apparently fraudulent within the 13 Eliz. c. 5, and that by his intermeddling, before administration granted to him, he became an executor *de son tort*, and liable as such; and that the law continued the possession in him from the time of intermeddling to the time of granting administration.

Bethel v. Stanhope, Cr. El. 810; 2 And. 172, S. C.

|| So, where a man assigned over his personal property to his son for a consideration *clearly inadequate*, and died, it was holden to be void as against creditors. But copyholds not being naturally subject to debts, a conveyance of them cannot be fraudulent against creditors.

Mathews v. Fraser, 1 Cox, 278. ||  $\beta$  A conveyance of real-estate was made by a man to the use of his children, and contingently to the use of his wife. He afterwards died, and a bill was filed by a creditor against the grantees, after the grantor's death; it was held that the conveyance was not only voluntary but fraudulent in fact on the part of the grantor. Blow v. Maynard, 2 Leigh, 30.*g*



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If A makes a bill of sale to B a creditor, and afterwards to C another creditor, and delivers possession at the time of the sale to neither, and after C gets possession of the effects, and B takes them out of his possession, C cannot maintain trespass, because the first bill of sale is fraudulent against creditors, and so is the second; yet they both bind A, and B's is the elder title, and the naked possession of C ought not to prevail against the title of B that is prior, where both are equally creditors, and possession at the time of the bill of sale is delivered over to neither.

Trin. 1706, Baker and Lloyd, *per* Holt, C. J.

If a gift be made to deceive one creditor, it is void against (a) all the creditors of the party, within the statute.

Moore, 615. *β* When the donor, at the time of making a voluntary gift, is indebted beyond small sums for the current expenses of his family, or debts inconsiderable in comparison with the value of his property, the gift is fraudulent and void as to existing creditors. *McElwee v. Sulton*, 2 Bailey, 128. See *Condery v. Zealy*, 2 Bailey, 205. *g* (a) Where a feoffment was made to deceive creditors, though by the event the king was cheated of his ward, yet being only to the intent and purpose to deceive creditors, it ought not to be extended farther. 10 Co. 57.—So, where there was a demise to A. to the intent the wife of the tenant should not be endowed during the life of A, it was holden that it could not be extended to any other intent or purpose. *Dyer*, 351.—Where one held of divers lords by heriot custom, and to the intent to deceive one, made a gift of all his beasts heriotable. 2 Leon. 8, 9; *Dyer*, 351.

|| If a person, having several creditors, convey by deed the legal interest in part of his real and personal property to a trustee in trust, (after deducting the expenses of the trust,) out of the rents and profits to pay half the surplus to the grantor for his own use, and the residue among certain creditors named in a schedule, there being no intent fraudulently to delay the creditors not named in the schedule in the obtaining of their demands, the deed is good in law.

*Estwick v. Cailland*, 5 T. R. 420; *β* *Marbury v. Brooks*, 7 Wheat. 556; *Spring et al v. S. C. Ins. Co. et al.*, 8 Wheat. 268; *Pearpoint v. Graham*, 4 Wash. C. C. R. 232; *Magniac v. Thompson*, 7 Pet. 348. *g*

Where a deed conveyed the lease of a farm, and all the grantor's effects and all debts due to him, to trustees in consideration of a certain sum to be paid to him by one of the trustees, in trust to dispose of all the property, and out of the produce to re-imburse that trustee the sum advanced by him to the grantor, and all other the trustees' demands upon him, and then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper, the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was) as a separate maintenance for her, in consequence of a separation between them on account of the husband's ill usage; it was holden, that the deed was not fraudulent or void, as against creditors, it appearing to have been made *bonâ fide* at the time, and that all the grantor's creditors then known had, upon application to the trustees, received payment of their debts.

*Nunn v. Wilshire*, 8 T. R. 521.

If A, indebted to B and C, being sued to judgment and execution by B, voluntarily give C a warrant of attorney to confess judgment, on which judgment is immediately entered, and execution levied on the same day on which B would have been entitled to execution, and had threatened to sue it out; the preference so given by A to C is not unlawful, nor fraudulent within the statute of 13 Eliz.

*Holbird v. Anderson*, 5 T. R. 235.

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β A debtor in consideration of his indebtedness to the plaintiff, conveyed to him by an instrument in writing, certain personal property, and it was therein provided and "agreed that the debtor shall remain in possession of the property until default of payment of what may be due to the plaintiff, at such time as he shall make demand of payment." Held, that this mortgage was valid against creditors, it being *bonâ fide*, and a delivery of the property having been made before any attachment or levy by any creditor, though not at the time of the execution of the instrument, and that it purported to secure, not only subsisting debts due to the plaintiff, but also to save him harmless from liabilities which he might subsequently incur for the debtor.

Adams v. Wheeler, 10 Pick. 199.*g*

After a creditor had distrained for rent the goods of his debtor, who was also under engagement with the creditor's agent for the sale of his goods, for the purpose of discharging the rent, and also certain book debts due to such creditor and his agent, the debtor confessed judgment to the defendant, another creditor, for a large nominal sum, with a defeasance that execution should issue only for such an amount as would cover the defendant's debt, and of all the other creditors among whom a rateable distribution was to be made, it was holden, that the judgment confessed, being in fact *bonâ fide*, and upon good consideration, was not covinous or fraudulent within the 13 Eliz., although it might have the effect of delaying or hindering the first-mentioned creditor in the recovery of the whole amount of his demands.

Meux q. t. v. Howell, 4 East, 1.

When A, debtor to the plaintiff, being sued by the plaintiff, pending the suit and before execution being insolvent, executed an assignment of all his effects to trustees for the benefit of all his creditors, under which possession was immediately taken; the assignment was holden not to be fraudulent within 13 Eliz. although made to the intent to delay the plaintiff of his execution.

Pickstock v. Lyster, 3 M. & S. 371.||

A man binds himself in a bond to pay money, and then in a statute to make such a conveyance, &c., a fraudulent conveyance is made contrary to the defeasance of the statute; though the conveyance be void against the first debtor, yet it is a breach of the condition of the statute, and the conusee shall be satisfied before the creditor by bond.

Cro. Ja. 131, 132.

It is not necessary that he who contracted the debt should make the fraudulent conveyance; for if a man binds himself and his heirs in a bond, and lands descend to his heir, who makes a fraudulent conveyance of those lands, the creditor shall avoid it.

5 Co. 60.

If a person intending to deceive a purchaser, conveys by deed enrolled his lands to the king, and afterwards, for valuable consideration, conveys to J S, the purchaser shall avoid this conveyance to the king by the 27 Eliz. c. 4; for although the statute does not by express words extend to the king, yet being a general law, and made for suppressing fraud, it shall include him.

2 Co. 54; 11 Co. 74.

So, if A being tenant in tail, remainder to B in tail or fee, and B under an apprehension that A designs to suffer a recovery, and destroy his remainder, by deed enrolled conveys his remainder to the king; yet if A for valuable consideration afterwards by recovery conveys the estate to J S and dies

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without issue, the purchaser shall avoid the conveyance to the king as fraudulent within the 27 Eliz. c. 4.

11 Co. 74 a, b.

In trespass against a bailiff of a manor for distraining goods, he justified by virtue of his authority, and that by his precept he was commanded to distrain the goods of J S, which goods came to the plaintiff's hands by colour of a fraudulent gift of them to the plaintiff; and, on issue, whether the sale was made *bonâ fide*, it was found for the defendant, and adjudged for him, although it was objected, that he being no creditor could not take advantage of the statute, which being a penal law ought not to be construed strictly.

Latch. 222, Sir Ambrose Turvil v. Tipper.

If a father makes a fraudulent lease of his lands, with an intent to deceive a purchaser, and dies before he makes any conveyance of the lands, and afterwards his son and heir, knowing or not knowing of this lease, conveys to J S for valuable consideration, J S shall avoid this lease within the 27 Eliz. c. 4.

6 Co. 72 b, and vide 1 Vern. 45, 46. *β* A gift of slaves to a son-in-law, though after the marriage, and though the father be indebted at the time for more than the value of his property, is not fraudulent *per se*, but this circumstance, if corroborated by others, may induce a jury to infer fraud. Toulmin v. Buchanan's executors, 1 Stewart, 67.

A has a lease of certain lands for sixty years if he live so long, and forges a lease for ninety years absolutely, and by indenture reciting this forged lease bargains and sells it for valuable consideration, together with all his interest in the land, to B; in this case B is not a purchaser within 27 Eliz. c. 4; for though there were general words in the sale to pass the true interest, yet it is plain that it was never contracted for, nor originally included in the bargain; so that the bargain being made of an imaginary interest, the bargainee can never come under the character of a real purchaser, to defeat the purchaser of the true lease of sixty years, which A was really possessed of.

Co. Lit. 3 b, Sir Richard Grobham's case.

A deed, though it be fraudulent in its creation, yet by matter *ex post facto* may become good; as, if one makes a fraudulent feoffment, and the feoffee makes a feoffment to another for a valuable consideration, and afterwards the first feoffor also, for valuable consideration, makes a second feoffment, the feoffee of the feoffee shall hold against the second feoffment of the first feoffor.

Sid. 134.

A agreed with the East India Company to go as president to Bengal, and entered into a bond of 2000*l.* penalty for performance of articles; but before he set out he made a settlement of his estate, and among other things he declared the trust of a term of 1000 years to be for the raising of 5000*l.* as a portion for his daughter, who afterwards married J S, a gentleman of 700*l.* *per ann.*, who before the marriage was advised by counsel that the portion was sufficiently secured; and who afterwards on her death-bed had, on her request, expended 400*l.* on her funeral, but never made any settlement on her; and A having embezzled the goods and stock of the company to a considerable value, the question was, whether this settlement was voluntary and fraudulent as to them; and it was holden to be a prudent and honest provision,

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without any colour of fraud; and though in its creation it was voluntary, yet being the motive and inducement to the marriage, it made it valuable.

Pr. Ch. 377, *East India Company v. Clavel*, Gilb. Eq. Rep. 37; 2 Eq. Ca. Abr. 52, pl. 6. See Pr. Ch. 305; 2 Eq. Ca. Abr. 481, pl. 13.

On the clause of the 27 Eliz. c. 4, that if a man settles land to uses, with a power of revocation, and afterwards sells the lands for valuable consideration, that the former uses shall be revoked; it hath been holden, that if a man having a future power of revocation bargains and sells the land before his power commences, yet it is within the act. So, if the power of revocation be reserved with the (a) consent of A, and he convey his land, not having revoked, the conveyance shall be good. So, if one having a power of revocation extinguish it by feoffment, and then sell, the sale shall be good.

Moore, 605; 3 Co. 82 b. (a) A man and his wife seised in fee of lands, in right of the wife, in consideration of the marriage of their son, and 500*l.* paid for a portion, levy a fine to the use of the father and his wife for their lives, then to their son and his heirs, proviso, that it should be lawful for the father to revoke, with consent of four persons, the relations of the son's wife; the father dies, the mother, without consent, sells the lands for valuable consideration to other persons; and it was holden, that the vendee should not avoid the settlement, the power of revocation being out of the power of them to effect, the consent of such being necessary, over whom the father and mother could not be presumed to have any power; otherwise if the consent were lodged with those persons, that may be supposed to be at the disposal of the persons to whom the power is reserved. 2 Jon. 94, 95.

This branch of the statute does not extend to creditors, and therefore if the conveyance was not made to deceive them, it seems they cannot avoid it.

If goods continue in the possession of the vendor, after a bill of sale of them, though there is a clause in the bill, that the vendor shall account annually with the vendee for them, yet it is a fraud; since if such colouring were admitted, it would be the easiest thing in the world to avoid the provisions and caution of the act.

Moore, 638; *β Clow v. Woods*, 5 S. & R. 279; *Wilt v. Franklin*, 1 Binn. 521; *Dawes v. Cope*, 4 Binn. 258; *Cunningham v. Neville*, 10 S. & R. 201; *Babb v. Clemson*, 10 S. & R. 419; *Myers v. Harvey*, 2 Penns. 481; *Carpenter v. Mayer*, 5 Watts, 483; *Young v. McClure*, 2 W. & R. 150; *Streeper v. Eckert*, 2 Whart. 302; *Eagle v. Eichelber*, 6 Watts, 29; *Bank of the U. S. v. Houseman*, 6 Paige, 526; *Overton, Exr. v. Ex'rs. of Morris*, 3 Port. 249; *Vernon v. Morton*, 8 Dana, 254; *Byrd v. Beadley*, 2 B. Monr. 240; *Bank of Orange County v. Fink*, 7 Paige, 87.*g*

*β* Both at common law and under the statutes of 13 Eliz., when personal property has been assigned by deed, it is requisite that possession should accompany and follow it.

1 Binn. 541; 5 S. & R. 273.

But when the possession is consistent with any condition or trust expressed in the assignment, the circumstance of non-delivery, when the retention of possession is a part of the contract, and it appears to be for a purpose fair, honest, and necessary, will not render the sale fraudulent.

*Dawes v. Cope*, 4 Binn. 258; *Babb v. Clemson*, 10 S. & R. 419; *Clow v. Woods*, 5 S. & R. 279.

A chattel purchased at sheriff's sale, may be safely left in the possession of the former owner, on any lawful contract of bailment.

*Myers v. Hawley*, 2 Penns. 481.

A valid bill of sale against creditors requires that there should be an accompanying, actual, visible, and notorious possession in the buyer.

*Hoofsmith v. Cope*, 6 Wharton, 53.*g*

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Where there is an absolute conveyance or gift of a lease for years, and the person who makes it continues in possession after such sale, the gift is fraudulent, because attended with that distinguishing character of a fraud. But, if the conveyance or sale be conditional, as that upon payment of so much money, the lease shall go to the vendee, then, continuance in possession after the gift does not make it fraudulent, because the vendee is not to have the lease in possession till he performs the condition.

2 Buls. 226, *Stone v. Grubham*.

If one makes a lease for years with a proviso to be void upon payment of 10s. this lease will be void against purchasers; but, if it be a mortgage for a considerable sum of money, though it be in the power of the mortgagor, yet it is not void.

*Cro. Ja.* 455.

[Where a father settled an estate upon his son, but took back an annuity to the value of it, Lord Hardwicke held that this was tantamount to a continuance in possession, and that the settlement was void as against creditors.]

*Russell v. Hammond*, 1 Atk. 13.

A entered into articles of partnership in fifths with three others for 21 years in digging for mines in A's lands, A to have two-fifths, and in consideration of his ownership of the land, to have a tenth out of the share of the other partners. In pursuance of these articles, they searched for mines, and in about two years, and after having expended about 120*l.*, they discovered a valuable mine, which they worked for three months, when A died: upon A's death, his widow set up a voluntary settlement made after marriage. But the court inclined to think that the partners were as purchasers, and that the voluntary settlement was void as to them.

*Shaw v. Standish*, 2 Vern. 326.

In the above case it was said to have been adjudged at law, that a lessee at a rackrent, and who paid no fine, was a purchaser within the statute, and should avoid a voluntary conveyance.

*Goodright v. Moses*, 2 Bl. Rep. 1019, S. P.]

If a man makes a voluntary settlement, reserving to himself a power to mortgage and charge the estate with what sums he pleases, this amounts in effect to a power of revocation, and is therefore fraudulent as to creditors by judgment.

2 Vern. 510.

It seems to be clearly agreed, that if a person makes a settlement on his wife, or child, after marriage, in consideration of love and affection, and not pursuant to any articles, or any agreement in consideration of the marriage, or marriage-portion, that such settlement being voluntary is fraudulent against purchasers within the 27 Eliz. c. 4.

6 Co. 73; *Cro. Ja.* 158, 455; *Hardr.* 395.

But, though the settlement be made after marriage, yet, if it were in pursuance of marriage articles, to make a provision on the wife and the issue of the marriage, it is not fraudulent; and in this case the wife and children become purchasers themselves, and shall avoid a prior voluntary conveyance, and shall in (a) equity have the same favour in not being obliged to discover papers, writings, &c.

*Cro. Ja.* 158, 455; *Lev.* 150; *Hardr.* 395. (a) *Vide* 1 Chan. Ca. 99; Vern. 440, 479; 2 Vern. 701.

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As, where a (a) person promised a woman, before marriage, to make her a jointure of 1000*l.* a year; and after marriage, for securing the payment thereof, made a lease to commence after his death for 100 years, with a proviso, that on making the settlement the lease should be void: this lease was holden good against a purchaser.

Cro. Ja. 454; Dame Griffin v. Stanhope, adjudged; and that the wife's concealing the conveyance in this case did not make it fraudulent, when, upon revealing of it, it appeared to be good. (a) That before the statute of frauds and perjuries, a verbal agreement before marriage was sufficient to prevent its being said to be fraudulent. Vent. 194. || And so it seems it would be now. Dundas v. Dutens, 2 Cox, 235; 1 Ves. jun. 196, S. C. ||

Where A made a lease for years, to the use of such person as should marry his daughter, provided he was then living and approved of the match; it was holden, that if A had sold the lands before the marriage, that the lease would be fraudulent against a purchaser; but, if before the sale the daughter marries, the father cannot defeat it, because it was the cause of the marriage, and drew on the stranger to engage in it, and is of the same effect as if it had been a special agreement with this particular person; and it was holden not to be necessary that the father approved of the match at the time, but that, if he approved of it seven years afterwards, it was sufficient.

Progers v. Langham, Sid. 133; Keb. 486, S. C.

So, where A surrendered the reversion in fee of copyhold lands to his son, to lessen the fine he must have paid in case it had come to him by descent; and after, on the son's treaty of marriage, the father tells the wife's friends that this copyhold was so settled on the son, in consideration of which, and of some leasehold lands settled by the father, a marriage was had, and 2000*l.* portion paid; though in the settlement no mention was made of the copyhold, yet it was holden that the surrender thereof, in the manner aforesaid, was not voluntary or fraudulent against a purchaser, because it was the principal inducement that prevailed on the friends of the son's wife to consent to the marriage, and to give her such a fortune, and that it ought to be considered as if it had been surrendered at the time of the marriage.

Pr. Ch. 275, Kirk v. Clerk.

[So, where on an ejectment brought by the assignee of a mortgagee, it was objected, that it did not appear, that any money was paid upon the original mortgage, and therefore it was fraudulent; and being fraudulent in the creation, though the present assignee paid a valuable consideration, yet this would not purge the fraud, and make it good against the defendant, who was a purchaser *bonâ fide*, and for a valuable consideration; Holt, C. J. answered, that the first mortgage was good between the parties; and being so, when the first mortgagee assigned for a valuable consideration, this was all one as if the first mortgage had been upon a valuable consideration: for the assignee stands in his place, and therefore is within the second proviso of the statute of 27 Eliz. c. 4.

Andrew Newport's case, Skin. 423, and 3 Lev. 387, S. C., by the name of Smartle v. Williams.]

It seems to be holden that if a bond be given before marriage to settle a jointure, and after the marriage a settlement be made, which goes farther, and entails the land upon the children of the marriage, that the settlement may be good as to the jointure, and fraudulent (b) as to the remainders in respect to a purchaser.

Vern. 285 (b) Where a father made a settlement on the marriage of his daughter,

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to himself for life, remainder to the daughter, and afterwards sold the land to another, whether the former conveyance shall be avoided during his life, within the 27 Eliz. c. 4, 2 Ro. Rep. 306, *qu.*—Where a settlement, in consideration of a marriage portion, was made on the husband and wife, and the issue of that marriage, remainder to the heirs of the body of husband; it was holden, that the consideration should extend to the issue of the husband of the second venter. Lev. 150, 237; Hardr. 395; Chan. Ca. 104. ||As to the extent of the consideration of marriage in settlements, see Pulvertoft v. Pulvertoft, 18 Ves. 92; Sutton v. Chetwynd, 3 Mer. 249.||

But, where the intended husband was under age, and so incapable of making a settlement, and the wife's father gave a bond for the payment 1500*l.* on his making a suitable jointure-settlement on her, without taking any notice whatsoever of the issue, and the marriage took effect; and the husband some years after, on the payment of the 1500*l.* made a settlement of 147*l.* *per ann.* on himself for life, remainder to his wife for life for her jointure, with remainder to their first and other sons, in the usual form; it was holden, that this settlement was neither voluntary nor fraudulent, being but adequate to the wife's fortune; and that the words of the bond were capable of such a construction, for that a jointure-settlement must be intended a settlement in the common form to the issue, and a jointure for the wife.

Pr. Ch. 520, Brunsden v. Stratton.

[So, where a woman, entitled to 6000*l.* secured by her mother's marriage-settlement, subject to the contingency of being lessened by the birth of another daughter, married clandestinely without any settlement; and after the marriage her father secured the 6000*l.* upon his estate, upon which her husband made a settlement upon her; such settlement was adjudged to be good against the husband's creditors.

Wheeler v. Caryll, Ambl. 121.

So, where the husband some time after marriage, in consideration of an additional portion of 100*l.* paid by the wife's mother, settled an estate of 100*l.* *per ann.* upon himself for life, remainder to his first and other sons, &c., and his mother, having an interest in the estate, joined with him in the conveyance; and thirteen years after, he mortgaged his estate with the usual covenants; and upon his death the mortgagee brought his bill against his son to foreclose; Lord Talbot said, that it would be very hard to call this a fraudulent settlement; since it was in consideration of a marriage had, and of an additional provision of 100*l.* paid by the wife's relations, which cannot be said to be voluntary against a creditor who lent his money thirteen years after.

Jones v. Marsh, Ca. temp. Talb. 64.

If a woman is entitled to a trust term, which the husband cannot lay hold of and possess, nor get at without the assistance of a court of equity; if the trustees will not raise the portion, and the husband goes into equity for aid; the court will decree an adequate settlement to be made on the wife, and will support it as a good settlement for a valuable consideration. So, if, after marriage, the wife being entitled to such a portion, which the husband cannot touch without the aid of the court, and which the trustees will not pay without the husband's making a settlement; if the husband does agree to it, and do that which the court would decree, it is a good settlement against creditors.

Ambl. 121. The like law if the particular assignee of the husband for a valuable consideration, apply to equity. Jewson v. Moulson, 2 Atk. 417.]

||Where a husband had lived in a state of adultery, in consequence of

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which a separation had taken place between him and his wife, and upon that occasion he settled real estates to the amount of 300*l.* *per ann.* on her for her separate maintenance, and on the children of the marriage; such settlement was holden not to be fraudulent under the statute of 13th Eliz. as against creditors.

Hobbs v. Hall, 1 Cox, 445.¶

[John Hamerton being seised in fee of an estate, and having a mother who had an annuity of 50*l.* *per ann.* issuing out of the whole, and also two brothers, Thomas and Vavasor; and being about to be married; his mother, previously to the marriage, consented to part with her security upon the whole estate for her annuity, and to take, instead thereof, a security for the same upon part of the estate; and accordingly she and John (the intended husband) join in a fine to deliver the whole estate from the annuity, and in consideration of the marriage, and of a portion of 1300*l.*, and of the grant and release of the annuity, John conveys to trustees that they should pay 50*l.* *per ann.* to the mother out of part of the estate for her life, then as to the whole, to the use of John for life, remainder to trustees to preserve contingent remainders, remainder to the first and every other son in tail-male, remainders to Thomas Hamerton and Vavasor Hamerton, severally, one after the other in tail-male in strict settlement, remainder to the daughter and daughters of the marriage of John Hamerton and his intended wife, remainder to John Hamerton in fee. There was no issue of the marriage; afterwards John Hamerton mortgaged the estate to Monckton, and acknowledged a fine to him *sur concessit*, then Monckton purchased of John Hamerton in fee for a valuable consideration, and took a fine from him *sur conusance de droit come ceo*, &c. John Hamerton died without issue, but Thomas Hamerton left a son, who brought an ejectment to recover the estate. It was holden, that this was a good settlement against purchasers, the consideration given by the mother making her a purchaser for her younger sons.

Roe v. Mitton, 2 Wils. 366.¶

¶A having an estate in fee of 6000*l.* a year in value, and being also tenant for life without impeachment of waste of another estate of the annual value of 5000*l.* with the reversion in fee, after an estate-tail in B his only son by a former marriage, became greatly indebted by mortgage, annuities, and otherwise, to the amount of 100,000*l.* A and B joined in conveying both estates to trustees, upon trust by sale or mortgage, or by sale of timber, or out of the rents and profits, to pay debts, and to apply so much of the rents and profits of what should remain unsold as they should think proper, as a sinking fund, and to pay the residue to A, and to settle the remaining trust estates (subject to an annuity of 1000*l.* a year to B, for the joint lives of him and A) upon A for life without impeachment of waste, with power to lease for twenty-one years only; remainder to trustees to preserve, &c.; remainder (subject to a jointure to the wife of A and to portions for children) to the joint appointment of A and B, and in default thereof to the appointment of B surviving, and in default thereof to B in tail-male; remainder to the other sons of A in tail-male; remainder to B in tail-general; remainder to the daughters of A in tail, with cross remainders; remainder to B in fee; with powers of leasing, and full powers to the trustees to manage. On a bill filed by A to be relieved against this settlement, one of the grounds insisted upon was the want of consideration; for that A had been deceived into a notion of the expediency of his son's co-operation, whereas, in truth,



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he was perfectly competent out of the unsettled estate to effect all the purposes of the arrangement without his son: and that, although the son's joining was no effective accommodation, he had been a most disproportionate gainer by the transaction, without any sacrifice or concession on his part. But Lord Loughborough decided, with great clearness, that as to the alleged want of value to support the settlement, there was no colour for that objection; that there was consideration enough to support the deed at law against creditors or purchasers; and there was consideration enough not only to support the beneficial limitations of the estates to the son, but all the other limitations in which the father was concerned; and that alluding to the case of *Roe v. Mitton* (*supra*), much slighter considerations had been holden sufficient in courts of law to support such a settlement, even against the most favourable case, that of a fair and honourable purchaser. The consideration, his lordship added, was a consideration of value; the thing parted with, the interest conveyed, the charge undertaken, were all of great and essential value, and would support, to the full extent, all the effects of the settlement, if any attempt were made to impeach it as void at law.

*Middleton v. Lord Kenyon*, 2 Ves. jun. 391. ||

[*William Watson*, in 1763, surrendered a copyhold estate, to which he was entitled in fee, to the use of himself for life, remainder to the defendant *Routledge*, (who was his nephew by a sister,) his heirs and assigns, and was admitted thereupon. This surrender was voluntary, and without any consideration, other than natural love and affection. In the year 1767, *Routledge* paid his addresses to a woman, whom he afterwards married, and showed a copy of the surrender to her father, but whether this had any influence in procuring the marriage did not appear. Afterwards, in 1773, *William Watson* surrendered the same estate to the use of *Hugh Watson*, a nephew by a younger brother, his heirs and assigns; and by a deed of the same date, executed by *William Watson*, reciting that *Hugh Watson*, upon the proposal and at the request of *William Watson*, had agreed with *William Watson* for the absolute purchase of the said estate for the sum of 200*l.*, and also the surrender in pursuance thereof, *William Watson* acknowledges the receipt of the 200*l.* from *Hugh Watson*, and enters into the usual covenants: there was a receipt endorsed on the deed for the 200*l.*, and it was in proof that it was paid. *Hugh Watson* was accordingly admitted upon the surrender, and entered into possession. It was in evidence that before, and at the time of the surrender to him, he knew of the surrender to *Routledge*: that the estate at the time of the surrender to *Hugh Watson* was worth between 50*l.* and 60*l. per ann.*, and the inheritance worth between 1800*l.* and 2000*l.* It did not appear that *William Watson* was indebted at the time of making the first surrender, or at the time of his death. It was holden, that the first settlement, though voluntary, was good within the 27 Eliz., for that there is no part of the act which affects voluntary settlements *eo nomine*, unless they are fraudulent; and that the deed of 1773 was not such a deed as ought to set the first settlement aside, supposing the first to be affected by the act, inasmuch as the consideration money was by no means adequate to the value of the estate, and the whole transaction was merely colourable.

*Doe v. Routledge*, Cowp. 705.] {Notwithstanding the opinion expressed by Lord Mansfield in this case and in *Cadogan v. Kennett*, Cowp. 434, it is settled that voluntary conveyances, as such, are fraudulent and void by st. 27 El. against a subsequent purchaser for valuable consideration, with or without notice. Cowp. 280; *Chapman*

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v. Emery, 2 Bro. C. C. 148; Evelyn v. Templar, 8 Term, 521; Nunn v. Wilsmore, 5 Ves. J. 862, Brown v. Carter; 4 Bos. & Pul. 332, Doe v. Martyr; 9 East, 59, Doe v. Manning.}

|| On a treaty of marriage between A and B, the father and mother of B, in consideration of the settlement to be made by A, joined in conveying a small estate (out of which the mother was dowable) to A in fee (but no fine was levied); and they also joined in settling another estate of which the father was seised in fee, on the father for life, *remainder to the mother for life*, remainder to the uses of the marriage. At the time of the settlement the father was indebted by specialty. This being a fair and reasonable family settlement, and not made with any view to defeat creditors, the limitation to the mother for life was holden not to be fraudulent as against creditors within the statute of 13 Eliz., more especially as she had joined in conveying the small estate in fee to the husband.

Jones v. Boulter, 1 Cox, 288.||

It has been holden, that *fraud* may be *given in evidence* to defeat a fraudulent and covinous conveyance, and that the party who offers it need not plead it, for the acts to prevent fraud are to be construed liberally in suppression of the mischief. Besides, it were a hardship to force the party to plead a thing that is managed with so much subtlety that he cannot attain a competent knowledge of it to plead it in due time.

5 Co. 60; Hob. 72. S. C. and S. P., cited and agreed. But, if the issue be taken directly, enfeoffed, or not enfeoffed, the feoffment must be avoided by pleading the fraud specially—and vide 10 Co. 56, 57; Cro. Car. 550, that covin is not to be presumed: and that if in a special verdict the jury find such circumstances in the case, as might very well have induced them to find fraud, yet if they do not expressly find it, it shall never be presumed. See 2 Ves. 155, *supra*.

|| A limitation in a marriage settlement in favour of a stranger, is held not within the consideration of marriage, and is consequently voluntary and void against a subsequent purchaser for valuable consideration, and it matters not that the purchaser has notice.

Sutton v. Chetwynd, 3 Meriv. R. 254.

And a limitation in favour of the settlor's brothers is also void as against a subsequent purchaser.

Johnson v. Legard, 3 Madd. 283; 6 Maule & S. 67.

But a limitation in favour of the settlor's issue by a second marriage, is held valid against a subsequent purchaser.

Clayton v. Wilton, 6 Maule & S. 67.

And where a father refused on his son's marriage to enable him to make a settlement, unless provision was made by the settlement for his brothers and sisters, these persons were held not to be mere volunteers; for though not within the consideration of marriage, they were within the agreement between the father and son, and therefore the settlement was not void as to them within the statutes.

Pulvertoft v. Pulvertoft, 18 Ves. 92; Goring v. Nash, 3 Atk. 189; Jones v. Boulter, 1 Cox, 294.

It appears that a recital in a settlement after marriage, of articles before marriage, is not evidence against creditors, though binding on the parties.

Battersbee v. Farrington, 1 Swanst. R. 106, and see 2 Ball & B. 251.

A vendee under a colourable sale for only part of the value of the estate,

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cannot set aside a previous settlement though voluntary, for the sale is at least as fraudulent as the settlement.

*Doe v. Routledge*, Cowp. 712; *Metcalf v. Pulvertoft*, 1 Ves. & Bea. 784; *Doe v. James*, 16 East, 212.

Though a voluntary settlement cannot stand against a subsequent purchaser for value, yet the court will not assist a settlor who comes into court to set it aside himself.

*Smith v. Garland*, 2 Meriv. R. 137.||

β Husband and wife sold lands devised to the wife by her father, and applied the proceeds to the payment of the husband's debts. The husband also cut and sold a large quantity of timber from her land. Afterwards a farm having been conveyed to the husband and wife "in equal shares," they conveyed a moiety of it, together with three other parcels of land, one of which was owned by the husband and the others by the wife, to the tenant, in trust for the wife and children, the consideration expressed in the deed being that she had joined with her husband in conveying certain lands devised to her by her father. The sale of the wife's lands was a fair equivalent for one half of the farm conveyed to the tenants. It was held that as against creditors of the husband, who was insolvent, the conveyance to the tenant was without consideration, for the husband had a legal estate in the moiety of the farm conveyed to the tenant and a freehold in the wife's land, and these were relinquished without an equivalent; the wood and timber cut by the husband was not deemed to be a part of the consideration, not being so stated in the deed, and there being no evidence of any other consideration than the one expressed.

*Williams v. Thompson*, 13 Pick. 298.

A sale of property under an execution brought about by the defendant in concert with others, with the avowed object of defeating the interest of a third person in such property, will be deemed fraudulent and void, although the execution be issued on a valid unsatisfied judgment.

*Crary v. Sprague*, 12 Wend. 41.

A voluntary conveyance, without consideration, made by an individual who is insolvent, is void against creditors existing at the time of the conveyance; and it is also void against subsequent creditors, if executed with a fraudulent intent in reference to their claims.

*Carlisle v. Rich*, 8 N. H. Rep. 44.

A father makes a deed to three infant children in consideration of natural love and affection, upon condition that they are to remain in his possession during life; at the time he was indebted in two bonds on which judgments are afterwards obtained and executions returned satisfied. He subsequently incurs other liabilities; held, that the facts do not constitute fraud *per se*, and that so far as this fraud is matter of fact, the jury not having found it, the jury cannot infer it.

*Charlton v. Gardiner*, 11 Leigh, 281.

In all cases of contracts, any representation of falsehood or concealment of truth, which if correctly known, would be a reason for making the terms of the contract different, in a court of equity will be a good ground for rescinding the agreement.

*White v. Flora and Cherry*, 2 Tenn. 427; *White v. Cox*, 3 Hayw. 79; *Peyton v. Butler*, 3 Hayw. 141; *Patton v. McClure*, Mart. & Yerg. 333.

A voluntary conveyance made by the grantor in favour of his wife and

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children, when he is about to engage in a new and hazardous business, is a strong badge of fraud.

Thompson v. Dougherty, 12 S. & R. 448.*g*

(D) In what Court Fraud is cognisable.

It is clearly agreed, that the Court of Chancery had always an original jurisdiction in relieving against frauds, and that at this day it is the only (a) court where matters of fraud are properly cognisable.

2 Vern. 261. *β* A court of law has a concurrent jurisdiction with a court of chancery, in cases of fraud; but when matters alleged to be fraudulent are investigated in a court of law, it is the province of the jury to find the facts, and determine their character. *Gregg v. The Lessee of Sayre and wife*, 8 Pet. 244; *Lessee of Swayze and wife v. Burke et al.*, 12 Pet. 11; *Lessee of Rhoads v. Selin*, 4 Wash. C. C. R. 715.*g* Vide of the jurisdiction of the Court of Chancery, tit. *Courts*. *β* In a court of equity, fraud properly includes all acts, omissions, and concealments, which involve a breach of either legal or equitable duty, trust, or confidence justly reposed, and which are injurious to another, or by which an unconscious advantage is taken of another. *Belcher v. Belcher*, 10 Yerg. 121.*g* (a) [But every kind of fraud is equally cognisable, and equally adverted to in a court of law; and some frauds are only cognisable there; as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined. 3 Bl. Comm. 431. And Lord Mansfield, in the case of *Bright v. Eynon*, 1 Burr. 396, says, that courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud. But the interposition of the former is often necessary for the better investigating of truth, and to give more complete redress. And Lord Loughborough, C., in the case of *Bates v. Graves*, 2 Ves. jun. 295, "When the Court of Chancery has declared a deed to be set aside for fraud and imposition, I must suppose that it would be equally set aside at law upon pleading to it." For courts of law relieve by making void the instrument obtained by fraud. *Wood's Inst.* 296.] *β* It is a general rule in equity that whenever a party has a perfect remedy at law, he cannot come into a court of equity to enforce his rights; some defect in the legal remedy being the very foundation of the equitable jurisdiction. But where, superadded to this legal right, a trust is expressly created, either by the deed of the parties, or by the operation of law, or both, a court of equity has a concurrent jurisdiction with the court of law; and the party, at his option, may proceed either to enforce his legal security, or he may come into equity to enforce the trust. *United States v. Myers*, 2 Brock. 516. See *Thornton v. Spottswood*, 1 Wash. 142; *Tarp-ley's administrator v. Dobbins*, 1 Wash. 185; *Pickett v. Morris*, 2 Wash. 255; *Branch v. Burnley*, 1 Call. 147; *Maupin v. Whiting*, Call, 224; *Barrett v. Floyd*, 3 Call. 531; *Bachelor v. Elliott's adm'rs.* 1 H. & M. 10.*g*

It hath however been doubted, whether a court of equity could give relief on the statutes which make conveyances and dispositions fraudulent against purchasers and creditors, being introductive of new laws. But it is now settled, that such relief may be proper in equity, and that directing an issue to be tried at law is only discretionary in the court.

Pr. Ch. 14; 2 Vern. 261, 436; 1 Cox, 445.

A recovers a judgment against the defendant's father, and the plaintiff (the sheriff's bailiff) levied 24*l.* of goods in possession of the defendant's father; the defendant brought trover against the plaintiff, pretending the goods to be his, because the landlord had seized them for rent, and sold them to him; but on evidence the sale was proved fraudulent, and that the father was in possession all along, and paid taxes for the farm and goods, &c. and therefore the judge gave directions to the jury to find for the defendant at law; but because he had not proved a copy of the judgment, as it was holden he ought, for that only reason the jury found against him; and he brought his bill for relief; and a demurrer to it on the arguing was overruled; then by answer he insisted upon his property under the bill of sale and recovery at law, where the matter is properly triable, and relied on that

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without examining any witnesses; but the plaintiff fully proved his case as before, and that the judge altered his directions only for want of proof of the judgment, and disproved the defendant's answer in some particulars; and a perpetual injunction was granted against the judgment, and the defendant to pay costs; for though it were examinable at law, so it was in equity too; and the plaintiff having set out the whole matter, and proved it to be true, if it were untrue the defendant might have disproved it.

Pr. Ch. 233, *Kent v. Bridgeman*.

β A party to a fraud cannot file a bill against his accomplice to prevent him from taking more than his share of the spoils, for the court will not interfere to enforce honour among thieves.

*Hamilton v. Ball*, 2 Irish Eq. 191. See a singular bill filed by a highwayman against his colleague to enforce the payment to him his share of the property robbed. 2 *Evans' Poth.g*

But it hath been holden, that a will relating to the personal estate cannot be set (α) aside in a court of equity for fraud and imposition, let the fraud be ever so great or so strongly proved; and that this is a matter properly cognisable in the spiritual court.

*Archer v. Mosse*, 2 Vern. 8; *Stephenson v. Gardiner*, 2 P. Wms. 286. (α) But though a will gained by fraud, and proved in the spiritual court, cannot be controverted in equity; yet if the party, claiming under such will, comes for any aid in equity, he shall not have it. 2 Vern. 76. β In general fraud will not be presumed, but must be proved; but it may be inferred, in a court of equity, from strong circumstances, such as gross inadequacy of consideration, breach of trust, and confidence, undue exertion of influence, over-diligence and assiduity in guarding against objections, and the like. *Whitehorn v. Hines*, 1 Munf. 557; *Watkins v. Stocket's adm'r.*, 6 Har. & Johns. 435; *Denton v. McKenzie*, 1 Desaus. 289, 300.*g*

It was once holden, that a will relating to the real estate, as well as a deed, may be set aside in equity, for fraud and circumvention; as, if a man agrees to give the testator 2000*l.* in bank bills, upon condition he devise his estate to him, and on the delivery of such bills he makes his will, and devises his estate to him, and the bills prove to be forged and counterfeit. 2 Vern. 700; Pr. Ch. 123.

But it hath been lately resolved in the House of Lords, that a will of a real estate could not be set aside in a court of equity for fraud or imposition, but must first be tried at law on *devisavit vel non*, being matter proper for a jury to inquire into.

Eq. Ca. Abr. 406. [*Kerrie v. Bransby*, 3 Br. P. C. 358, and *Webb v. Claverden*, 2 Atk. 424; *Bennet v. Wade*, *Ibid.* 334; *Anon.* 3 Atk. 17; *Bates v. Graves*, 2 Ves. jun. 287.]

|| As to the circumstances of fraud which will set aside a will, see *Mountain v. Bennett*, 1 Cox R.||

β If there be any one ground upon which a court of equity affords relief, it is an allegation of fraud, proved or admitted.

*Atkins v. Dick*, 14 Pet. 114.*g*

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It is clear from many instances, that gross frauds are punishable by way of indictment or information; such as playing with false dice, causing an illiterate person to execute a deed to his prejudice, levying a fine in another's name, &c.; and that for these and such like offences the party may be punished not only with fine and imprisonment, but also with such further infamous punishment as the judges in their discretion shall think proper.

*Cro. Ja.* 497; 2 Ro. Abr. 78; 2 Ro. Rep. 107; *Keb.* 849; 6 Mod. 42; *Sid.* 312, 431;

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Noy, 99, 103; Moore, 630; Cro. Eliz. 531; Mod. 46; 2 Jon. 64; Ld. Raym. 865; Hawk. P. C. c. 71. *Uttering a fictitious bank-bill, although not purporting to be countersigned by the cashier of the bank by which the bill is supposed to be issued, with intent to injure and deceive, is a fraud at common law, punishable by indictment.* Commonwealth v. Baynton, 2 Mass. 77.g

But it hath been holden, that the deceitful receiving of money from one man for another's use, upon a false pretence of having a message and order to that purpose, is not punishable by any criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be sufficient security.

6 Mod. 105; Salk. 379; 5 Mod. 18; R. v. Bazeley, 2 Leach's Ca. 835.

But by the 33 H. 8, c. 1, it is ordained and enacted, "That if any person or persons, of what estate or degree soever he or they be, falsely and deceitfully obtain, or get into his or their hands or possession, any money, goods, chattels, jewels, or other things of any other person or persons, by colour or means of any such false token, or counterfeit letter, made in any other man's name, as is aforesaid, that then every such person and persons so offending, and being thereof lawfully convicted by witnesses taken before the lord chancellor of England for the time being, or by examination of witnesses or confession taken in the Star-chamber at Westminster before the King's most honourable council, or before the justices of assize in their circuit for the time being, or before the justices of peace in any part of the King's dominion in their general sessions, or by action in any of the King's courts of record; shall have and suffer such correction and punishment by imprisonment of body, setting upon the pillory, or otherwise, by any (a) corporeal pain, except pains of death, as shall be to him or them limited, adjudged, or appointed by the person and persons before whom he shall be so convicted of the said offences or any of them."

(a) It is said, that the offender cannot be fined in a prosecution upon this statute, because it is expressly ordained that some corporeal punishment shall be inflicted, and no other is mentioned. 3 Inst. 123. But in Cro. Car. 564, there is a precedent, by which it appears, that one convicted on such a prosecution hath been adjudged not only to stand in the pillory, but also to pay a fine of 500*l.* and to be bound with sureties to his good behaviour.

And it is further enacted by the said statute, "That as well the justices of assize for the time being, as also two justices of peace in every county, whereof one to be of the *quorum*, shall have full power and authority to call and convene by process or otherwise, to the said assizes or general sessions, any person or persons being suspected of any of the offences aforesaid, and to commit him or them to ward, or let him or them to bail, till the next assizes or general sessions, there to be examined and further to be ordered by their discretion as is above said."

And by the 27 Eliz. c. 4, § 3, the same *mutatis mutandis* is enacted as to fraudulent conveyances to deceive purchasers.

[It is also enacted by 30 Geo. 2, c. 24, "That all persons who knowingly and designedly by false pretences shall obtain from any person money, goods, wares, or merchandises, with intent to cheat and defraud any person or persons of the same, shall on conviction be put in the pillory, or publicly whipped, or fined and imprisoned, or transported, for the term of seven years, as the court shall in discretion think fit."]

|| Upon this statute no *certiorari* lies. R. v. Smith, Cowp. 24.||

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|| By 52 G. 3, c. 64, the 30 G. 2, c. 24 is extended to any bill, bond, bill of exchange, bank note, promissory note or other security for payment of money, or delivery or transfer of goods, or other valuable thing.||

[In an indictment upon the statutes both of 33 H. 8, & 30 G. 2, the false pretences and false tokens made use of by the defendant must be set forth: if they are not, it is error, for which a judgment against the defendant will be reversed.

R. v. Mason, 2 T. R. 581; R. v. Munoz, 2 Str. 1127.

|| But, if the pretences be stated, and the truth of them be negatived, it is sufficient, though it be not in terms alleged, that the defendant *falsely* pretended.

R. v. Airey, 2 East, 30.

The statute of 30 G. 2, applies to all cases where goods are obtained by false pretences of any kind; but both that statute and the statute of 33 H. 8, are confined to cases where credit is obtained in the name of a third person, and do not extend to a case, where a man on his own account gets goods with an intention to steal them; where an original intent to steal appears, the statutes do not apply; where no such intent appears, if the means mentioned in the statutes are made use of, the legislature has made the offender answerable criminally, who before, by the common law of the land, was answerable only civilly. Such was the opinion given by the judges in considering the case of the King v. Pares.

2 East, P. C. 686; Leach's Ca. 499.

Although to constitute an offence within the statute of 30 G. 2, the money or goods must be obtained by a false pretence with an intent to defraud; yet the pretence may relate to a future transaction; and if made by one in the presence of and in concert with others, they may be all included jointly in the same indictment.

R. v. Young, 2 T. R. 505; 1 Leach's Ca. 505, S. C.||

By the 13 Eliz. c. 5, § 2, it is enacted, "That all and every the parties to such fained, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed in the statute, and being privy and knowing of the same, or any of them, which shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had, or made *bonâ fide* and upon good consideration; or shall alien or assign any the lands, tenements, goods, leases, or other things, before mentioned, to him or them conveyed, or any part thereof, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits of or out of the same, and the whole value of the said goods and chattels, and also so much money, as are or shall be contained in any such covinous and fained bond; the one moiety whereof to be to the queen's majesty, her heirs and successors, and the other moiety to the party or parties grieved by such fained and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges, and other things aforesaid, to be recovered in any of the queen's courts of record, by action of debt, bill, plaint or information, wherein none essoign, protection, or wager of law shall be admitted for the defendant or defendants; and also being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprize."

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To an information brought in London on the aforesaid act for justifying *apud* L of a fraudulent gift of goods made by A to the defendant to defraud the plaintiff of his debt, the defendant saith, that A gave these goods to him at *C bonâ fide*, and that he justified the gift there, and traverses the justifying it at L, and ruled to be no plea; for 31 Eliz. c. 4, restrains common informers to bring their actions only in the proper county where the offence was done; yet that does not extend to a party grieved, but that he may inform in what county he pleases, for he is not a common informer.

Dyer, 351, pl. 23; 2 Leon. 8; Cro. Eliz. 645.

|| By 50 G. 3, c. 59, "If any person or persons to whom any money or securities for money shall be issued for public services, shall from and after the passing of this act embezzle such money, or in any manner fraudulently apply the same to his own use or benefit, or for any purpose whatever except for public services, every such person so offending, and being thereof duly convicted according to law, in any part of the United Kingdom, shall be adjudged guilty of a misdemeanor, and shall be sentenced to be transported beyond the sea, or to receive such other punishment as may by law be inflicted on persons guilty of misdemeanor, and as the court before which such offenders may be tried and convicted shall adjudge."

By § 2, "If any such officer, collector or receiver, so intrusted with the receipt, custody, or management of any part of the public revenues, shall knowingly furnish false statements or returns of the sums of money collected by him or intrusted to his care, or of the balances of money in his hands or under his control, such officer, collector or receiver, so offending, and being thereof convicted, shall be adjudged guilty of a misdemeanor, and shall be adjudged to suffer the punishment of fine and imprisonment, at the discretion of the court, and be rendered for ever incapable of holding or enjoying any office under the crown."

By 52 G. 3, c. 63, "If any person or persons with whom (as banker or bankers, merchant or merchants, broker or brokers, attorney or attorneys, or agent or agents of any description whatsoever) any ordnance debenture, exchequer bill, navy, victualling, or transport bill, or other bill, warrant, or order for the payment of money, state lottery ticket or certificate, seaman's ticket, bank receipt for payment of any loan, India bond, or other bond, or any deed, note, or other security for money, or for any share or interest in any national stock or fund of this or any other country, or in the stock or fund of any corporation, company, or society established by act of parliament or royal charter, or any power of attorney for the sale or transfer of any such stock or fund, or any share or interest therein, or any plate, jewels, or other personal effects, shall have been deposited, or shall be or remain for safe custody, or upon or for any special purpose, without any authority, either general, special, conditional, or discretionary, to sell or pledge such debenture, bill, warrant, order, state lottery ticket or certificate, seaman's ticket, bank receipt, bond, deed, note, or other security, plate, jewels, or other personal effects, or to sell, transfer, or pledge the stock or fund, or share or interest in the stock or fund to which such security or power of attorney shall relate, shall sell, negotiate, transfer, assign, pledge, embezzle, secrete, or in any manner apply to his or their own use or benefit, any such debenture, bill, warrant, order, state lottery ticket, or certificate, seaman's ticket, bank receipt, bond, deed, note, or other security, as hereinbefore mentioned, plate, jewels, or other personal effects, or the stock or fund, or share or interest in the stock or fund to which such security or power of attorney shall relate, in



(E) Where a Wrong-doer is further punishable, &c.

violation of good faith, and contrary to the special purpose, for which the things hereinbefore mentioned, or any or either of them, shall have been deposited, or shall have been or remained with or in the hands of such person or persons, with intent to defraud the owner or owners of any such instrument or security, or the person or persons depositing the same, or the owner or owners of the stock or fund, share or interest, to which such security or power of attorney shall relate, every person so offending, in any part of the United Kingdom of Great Britain and Ireland, shall be deemed and taken to be guilty of a misdemeanor, and being thereof convicted according to law, shall be sentenced to transportation for any term not exceeding fourteen years, or to receive such other punishment as may by law be inflicted on a person or persons guilty of a misdemeanor, and as the court before which such offender or offenders may be tried and convicted shall adjudge."

By § 2, reciting "That it is usual for persons having dealings with bankers, merchants, brokers, attorneys, and other agents, to deposit or place in the hands of such bankers, merchants, brokers, attorneys, and other agents, sums of money, bills, notes, drafts, checks, or orders for the payment of money, with directions or orders to invest the money so paid, or to which such bills, notes, drafts, checks, or orders relate, or part thereof, in the purchase of stocks or funds, or in or upon government or other securities for money, or to apply and dispose thereof in other ways, or for other purposes; and it is expedient to prevent embezzlement and malversation in such cases also; it is enacted, that if any such banker, merchant, broker, attorney, or other agent, in whose hands any sum or sums of money, bill, note, draft, check, or order for the payment of any sum or sums of money shall be placed, with any order or orders in writing, and signed by the party or parties who shall so deposit or place the same, to invest such sum or sums of money, or the money to which such bill, note, draft, check, or order as aforesaid shall relate, in the purchase of any stock or fund, or in or upon government or other securities, or in any other way or for any other purpose specified in such order or orders, shall in any manner apply to his or their own use and benefit, any such sum or sums of money, or any such bill, note, draft, check, or order for the payment of any sum or sums of money as hereinbefore mentioned, in violation of good faith and contrary to the special purpose specified in the direction of order in writing hereinbefore mentioned, with intent to defraud the owner or owners of any such sum or sums of money, or order for the payment of any sum or sums of money; every person so offending in any part of the United Kingdom, shall in like manner be deemed and taken to be guilty of a misdemeanor, and being convicted thereof according to law, shall incur and suffer such punishment as is hereinbefore mentioned."

§ 3. "Provided always, That nothing herein contained shall extend or be construed to extend, to prevent any of the persons hereinbefore mentioned from receiving any money which shall be or become actually due and payable upon or by virtue of any of the instruments or securities hereinbefore mentioned, according to the tenor and effect thereof, in such manner as he or they might have done, if this act had not been made."

§ 4. "Provided also, That the penalty by this act annexed to the commission of any offence intended to be guarded against by this act, shall not extend or be construed to extend to any partner or partners, or other person or persons of or belonging to any partnership, society, or firm, except only such partner or partners, person or persons, as shall actually commit or be

(E) Where a Wrong-doer is further punishable, &c.

accessary or privy to the commission of such offence; any thing herein contained to the contrary in anywise notwithstanding."

§ 5. "Provided also, That nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall hinder, prevent, lessen, or impeach any remedy at law or in equity, which any party or parties aggrieved by any offence against this act might or would have had, or have been entitled to if this act had not been made, nor any proceeding, conviction, or judgment had been had or taken thereupon; but nevertheless the conviction of any offender against this act shall not be received in evidence in any action at law, or suit in equity, against such offender; and further, that no person shall be liable to be convicted by any evidence whatever, as an offender against this act, in respect of any act, matter, or thing done by him, if he shall at any time previously to his being indicted for such offence, having disclosed such act, matter, or thing, on oath, under or in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, in or to which he shall have been a party, and which shall have been *bonâ fide* instituted by the party aggrieved by the act, matter, or thing, which shall have been committed by such offender aforesaid."

§ 6. "Provided always, That nothing in this act contained shall extend to or affect any person or persons being a trustee or trustees in or under any marriage settlement, will, or other deed or instrument, or being a mortgagee or mortgagees of any property whatsoever, whether real or personal, in respect of any act or acts done by any such person or persons in relation to the property comprised in or affected by any such trust or mortgage as aforesaid."

§ 7. "Provided always, That every person who shall commit, in Scotland, any offence against this act, which by the provisions thereof is constituted a misdemeanor, shall be liable to be punished by fine and imprisonment, or by either of them, or by transportation for any term not exceeding fourteen years, as the judge or judges before whom such offender shall be tried and convicted may direct."

§ 8. "Provided always, That nothing herein contained shall extend to restrain any banker, merchant, broker, attorney, or other agent, from selling, negotiating, transferring, or otherwise disposing of any securities, property, or other effects as aforesaid, in their custody or possession, upon which they shall have any lien, claim, or demand, which by law entitles them to sell or dispose thereof, unless such sale, transfer, or other disposal shall extend to a greater number or to a greater part of such securities, property, or other effects as aforesaid than shall be requisite or necessary for the purpose of paying or satisfying such lien, claim, or demand; any thing hereinbefore contained to the contrary thereof in anywise notwithstanding."||

|| The 52 G. 3, c. 63, as to embezzlement, is wholly repealed by 7 & 8 G. 4, c. 27, but its provisions are in effect re-enacted with alterations by the 7 & 8 G. 4, c. 29, § 49, 50.

The 52 G. 3, c. 63, was held to apply only to persons to whom securities were intrusted in the exercise of their functions or business, and not to one who as a private friend was intrusted to get a bill discounted, and converted it to his own use.

Rex v. Prince, 3 Carr. & P. 517; and see Rex v. Somerton, 7 Barn. & C. 463; Archbold, C. L. 228, (4th edit.)

## GAME.

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BEFORE we take notice of the statutes made for the preservation of the game, it may be necessary to observe how the common law stood herein ; and this depends upon the difference made between tame and wild animals.

2 Bl. Com. 410.

The tame animals, such as (*a*) horses, cows, sheep, &c., are such creatures, as by reason of their sluggishness and unaptness for motion, do not fly the dominion of mankind, but generally keep within the same parishes and pastures, and may be easily pursued and overtaken if by accident they should escape ; and therefore the owner hath the same kind of property in them as he hath in inanimate chattels, and for the violation thereof may bring an action of trespass.

(*a*) Hens and chickens are tame. So peacocks, like other domestic fowls, are tame. Off. of Exec. 83 ; Roll. Abr. 5 ; 18 H. 8, 2. So, several sorts of dogs are tame, as the mastiff, hound, which comprehends greyhound, &c., spaniel, and tumbler ; and for these a person may maintain an action of trespass, without alleging that they were tame. *Ireland v. Higgins*, cited and agreed.——So a person may justify in assault and battery in defence of his dog that is tame, *Rast. Ent. 611.*——So, a replevin lieth of a ferret, *Cro. Eliz. 126.* *β* Trover lies for wild geese which have strayed away, without regaining their natural liberty. *Amory v. Flynn*, 10 Johns. 102.*g*

The wild animals, such as deer, hares, foxes, &c., are understood to be those, which by reason of their swiftness or fierceness fly the dominion of man, and in these no person can have a property, unless they be tamed or reclaimed by him ; and as property is the power that a man hath over any other thing for his own use, and the ability that he has to apply it to the sustentation of his being, when the power ceases, his property is lost : and by consequence, an animal of this kind, which after any seizure escapes into the wild common of nature, and asserts its own liberty by its swiftness, is no more mine than any creature in the Indies, because I have it no longer in my power or disposal.

7 Co. 16 ; 3 Lev. 227.

Hence it appears, that by the common law every man had an equal right to such creatures as were not naturally under the power of man, and that the mere caption or seizure created a property in them.

5 Co. 104 ; *Cro. Eliz. 547.*

By immediate manucaption, or taking them and killing them, they belong to such person in the same manner as any other chattels, and cannot be violated from him, since the first seizure and caption was sufficient to vest the property of them in him.

7 Co. 17. { Not only actual manucaption, but also the wounding of wild animals, by one not abandoning his pursuit, which prevents their escape and brings them within his certain control, and encompassing and securing them with nets and toils, or otherwise intercepting them, so as to deprive them of their natural liberty and render escape impossible, will vest the property of them in him. But merely starting and pursuing them with hounds gives no right of property ; and therefore an action cannot be supported against one who intercepts and kills them in the view of the pursuer, while he is continuing the pursuit. 3 Cain. 175, *Pierson v. Post.* }

By taking and taming them, they belong to the owner, as do all the other

tame animals, so long as they continue in this condition, that is, as long as they can be considered to have the mind of returning to their masters; for while they appear to be in this state they are plainly the owner's and ought not to be violated; but when they forsake the houses and habitations of men, and betake themselves to the woods, they are then the property of any man.

7 Co. 17 b; Doct. Placit. 314. *β* Wild geese which have been tamed and have strayed away, without regaining their natural liberty, still belong to the person who tamed them. *Amory v. Flynn*, 10 Johns. 102.*g*

Another way of gaining property in them is by enclosure, and then the beasts must be understood to be mine, as the profits of the soil itself are, and they can no more be taken and carried off than any other profits of the land; and therefore if deer be enclosed in a park or paddock, conies in a field or warren, they become so my own, that no man ought to kill or take them away. And since in this case it is the enclosure only that retains them (for take away the enclosure and they are in their natural liberty;) therefore, the party is said to have right as he hath to any other profits there enclosed, and a distinct and independent right in every animal.

March, 49. *β* Wild bees, on a tree, belong to the owner of the soil where the tree stands. *Ferguson v. Miller*, 1 Cowen, 433; but if they have been reclaimed, and can be identified, they belong to their former owner. *Goff v. Kiltz*, 15 Wend. 550. In *Wallis v. Mease*, 3 Binn. 546, it was decided that bees confined in the top of a tree, by the owner of the tree, and not secured in a hive, were not the subject of larceny. But when hived and reclaimed, they become the subject of a qualified property. *Gillet v. Mason*, 7 Johns. 16. Doves are *feræ naturæ*, and not subject of larceny, unless they have been reclaimed. *Commonwealth v. Chase*, 9 Pick. 15.*g*

The king, as an acknowledgment of his dominion over the seas and great rivers by his prerogative, has a property in some animals under the denomination of royal creatures, as *sturgeons*, *whales*, and *swans*, all which are the natives of seas and rivers.

7 Co. 16.

On these reasons and distinctions of the common law, we may now see how the law stands with regard to persons qualified to kill the game, within the statutes made for the preservation thereof.

First it is clear, that if a man pursue deer, hares, or conies out of his land, or the lands of another, into (*a*) mine, and there take them, they are the hunter's and not mine, because I never had any original property by enclosing them.

*Mich.* 9 W. 3, *Sutton v. Moody* agreed, *per Curiam*: 1 Ld. Raym. 250, S. C.; 2 Salk. 556, S. C.; 5 Mod. 375, S. C.; 12 Mod. 145, S. C.; Com. Rep. 34, S. C.; 2 Bl. Comm. 419, S. P.; *Churchward v. Studdy*, 14 East, 249, S. P. (*a*) But it is said, that if a man flies his hawk at a pheasant on his own ground, and the hawk pursues the pheasant into another's warren, the owner of the hawk cannot justify entering the warren and taking the pheasant. 38 Ed. 3, 10 b; 12 H. 8, 10; 2 Roll. Abr. 567; Poph. 162, S. C. cited. *β* A hunter is not entitled to a wild animal by merely pursuing and hunting it, and another person may lawfully kill such an animal and appropriate it to his own use. *Pierson v. Post*, 3 Caines, 175. But if the hunter wound an animal mortally, or by nets or other contrivances intercept it, so as to deprive it of its natural liberty, and render escape impossible, he acquires a property in it; unless he abandons the pursuit. *Buster v. Newkirk*, 20 Johns. 75. The civil law accords with this decision. Poth. Du Dr. de Propriété, lere part. c. 2, s. 1, art. 2, n. 26; Puff. lib. 4, c. 6.*g*

If a man hunts conies, and kills them in my ground, I may seize them, because they are indeed my property by the enclosure; but, if he hunts them out of my ground, they are in the condition of natural liberty, and then I

cannot take them away from the hunter, for then the property is in no man: but damages I may have against the hunter for his entering and breaking my enclosure.

Mich. 9, W. 3, Sutton v. Moody.

But, where a man hunts conies in my warren, or deer in my park, and the warrener pursues them, he may retake them; for the park or warren is set apart by the public for the preservation of the game; for all things occupied, in which no man hath a civil right, are under the regulation of the public. Now in parks and warrens, officers are established by authority to have an eye over the game, and to keep it within the boundaries; so that the property is not altered by driving it out of the enclosures, unless it be also out of the pursuit of the officers; for, as long as he that is thus trusted doth pursue it, it is not in its natural liberty, but is still belonging to the warren.

12 H. 8, 9.

|| An action lies for hunting in a free warren, though no game be taken; and such an action is maintainable even against the owner of the soil.

Lord Dacre v. Tebb, 2 Bl. Rep. 1151; Patrick v. Greenway, 1 Saund. 347 b. ||

Also, the common law warrants the hunting of ravenous beasts of prey on another's ground, such as foxes, wolves, badgers, &c., so that the party in pursuing those through the grounds of another is subject to no action whatsoever. But it hath been (a) resolved, that the hunting and killing such noxious animals must be done in the ordinary and usual manner; and that therefore the digging for a badger is unlawful, and the party subject to an action of trespass.

Poph. 162; Latch. 119. (a) Geuch v. Mynns, Cro. Ja. 321; 2 Buls. 60, S. C. || Indeed this right of following foxes over the lands of another without his consent, seems to rest upon very slender loose authorities, and is rendered exceedingly questionable by some recent decisions. See Gundry v. Feltham, 1 T. R. 334, and Earl of Essex v. Capel, Hertf. Summ. Ass. 1809. *Coram* Ellenborough, C. J., Chitty's G. L. App. 1381. ||

A warrener or keeper of a park may justify the killing of dogs and cats, as well as other vermin, which he finds disturbing the game in those places.

|| Wadhurst v. Damme, Cro. Ja. 44; Barrington v. Turner, 3 Lev. 28; Lewin's case, 2 Rol. Abr. tit. *Trespass* (L); Vin. Abr. tit. *Trespass* (L, a) p. 2, *contr.* But Lewin's case, as well as that of Wadhurst v. Damme, were brought under consideration of the court in determining the case of Barrington v. Turner. In the case of Wadhurst v. Damme the justification was, that the dog was divers times killing conies in the warren, and therefore the warrener, finding him there at the time when, &c., running at the conies, there killed him. In the case of Barrington v. Turner it was, that the greyhounds chased a deer in the defendant's park, and there killed her; on which, to prevent further mischief by them, the defendant took the greyhounds and killed them. But though the owner or keeper of a park or warren has this power, yet the lord of a manor has no power, as such, or as the owner of private land within the manor, to kill the dog of a qualified person running after game in it. Vere v. Lord Cawdor, 11 East, 568. Neither is a person who has put up a notice that dogs trespassing in his land will be shot, thereby at liberty to shoot another's dog coming thereon. Corner v. Champneys, Taunton Lent Ass. 1814, *coram* Dampier, J., 2 Marsh. 584. ||

A man cannot have an action of trespass on the case, for another man's conies breaking into his ground, because they are no longer the other's than while they are enclosed, so that no violation arises to the property of one

man by the beast of another ; but the conies being in their natural liberty may be lawfully killed by the owner of the soil.

5 Co. 104 ; Cro. Eliz. 547 ; Moor, 420 ; Roll. Abr. 90, 405 ; 2 Le. 201.

|| So, in a subsequent case, it was holden, that a commoner may kill rabbits upon the waste, which have not been put on by the lord, nor have burrows there, but have escaped from the adjoining land, and that he could not support any action against the owner of such adjoining land for keeping rabbits, however injurious to the common.

Hinsley v. Wilkinson, Cro. Car. 387.||

An action of trespass may be brought for taking a man's deer in a park or chase, or conies in his warren, for the law takes notice that they are enclosed, because these are the proper enclosures for that purpose ; and, consequently, those beasts are not in their natural liberty, and therefore the property is in the plaintiff.(a)

March, 49 ; Godb. 174 ; Rast. Ent. 650 ; Reg. 93. But Child v. Green, 7 Co. 17, *cont.*, and vide Cro. Car. 553, that trespass lies for breaking his close, and fishing *in separali piscariâ suâ*, and for taking *pisces suos*, &c., for being alleged to be *in separali piscariâ snâ*, he may say they were *pisces suos*. (a) || In Sutton v. Moody, *supra*, it was holden, that trespass for entering a close, though not a free warren, and killing the plaintiff's rabbits there, is maintainable, though it was objected that rabbits are *feræ naturæ*, and therefore that there is no property in them in any one ; but it was admitted, that for hunting in a free warren, and killing plaintiff's rabbits there, trespass is maintainable, because he would have a privileged property in them ; upon which Holt, C. J., said, "a warren is a privilege to use his land for such a purpose, and a man may have a warren in his own land, and he may alienate the land, and retain the privilege of the warren ; but this gives no greater property in the rabbits to the warrener ; for the property arises to the party from the possession ; and therefore, if a man keeps rabbits in his close, as he may, he has a possessory property in them so long as they abide there ; but, if they run into the lands of his neighbour, the latter may kill them, for then he has the possessory property."||

In an action of trespass *quare clausum fregit, et damas ipsius querentis cepit et asportavit*, they shall be intended to be enclosed after a verdict ; because when a verdict hath found that they are the deer of the plaintiff, that verdict must be intended to be true ; therefore the deer must be intended so to be enclosed as to be under the plaintiff's power ; otherwise he could not have property according to the verdict.

Mich. 9 W. 3, Sutton v. Moody.

But if, in trespass *quare duas damas ipsius querentis in quodam clauso querentis vocat. le park, cepit et asportavit*, the defendant demurs generally ; this hath been ruled to be ill, because the court will not intend them to be tamed or enclosed ; and in beasts, that are in their natural liberty, the plaintiff hath no property ; for being only a place called a park, it cannot be understood to be a park.(b)

Mallocke v. Eastly, judged, 3 Lev. 227. (b) || For it is not every enclosed place stocked with a herd of deer, that is thereby constituted a legal park ; for the king's grant, or at least immemorial prescription, is necessary to make it so. 2 Bl. Comm. 38 ; 2 Inst. 199 ; 11 Co. 86 ; 1 H. II. P. C. 491 ; Willes's Rep. 46.||

Any person, upon his own frank-tenement, may erect a dove-house ; nor can he for such building be indicted in the leet. This was a matter often controverted, because the pigeons and doves were to be accounted as tame animals, inasmuch as they had *animum revertendi* ; and then whoever did erect such houses, was answerable for the damage ; and because he was not liable to every man's action, to avoid multiplicity of suits, it was formerly holden, that he was indictable in the leet. But the contrary opinion pre-

vailed, because it was allowed the lord of the manor might erect, or permit by his license any person to erect a dove-house; but no person could raise himself, or authorize another to create a nuisance. Besides, these animals are rather to be accounted *feræ nature*; and, by consequence, the only remedy any person had for the damage sustained by the birds feeding on his ground, was to kill them and take them to himself, which was the proper relief according to the common law, inasmuch as the birds were accounted no man's property. (a)

2 Roll. Abr. 138; Poph. 141; Cro. Ja. 382, 490; Godb. 259; Cro. Eliz. 548; Roll. Rep. 136, 200; 2 Roll. Rep. 3, 30; 5 Co. 104. (a) || But it appears from the above cases that a qualified property in these animals may be obtained by other titles; as *per industriam*, by a man's reclaiming or making them tame, and so confining them within his own immediate power, that they cannot use their natural liberty; *propter privilegium*, by having the privilege of hunting, taking, or killing them in exclusion of other persons, by virtue of a grant of a forest, chase, or free warren, or of a several or free fishery; or *ratione soli*, whilst the animals are on a man's private ground. The right of every freeholder, from the earliest periods of the common law, to take and kill game found upon his own premises, *ratione soli*, is admitted even by Mr. Justice Blackstone, though he insists upon an exclusive right in the crown. The laws of Canute, and of Edward the Confessor, show it. 4 Inst. 320. And there is a parliamentary recognition of it in the preamble of 11 H. 7, c. 17, which recites, "That divers persons having little substance to live upon, use many times, as well by nets, snares, or other engines, to take and destroy fessants, and partridges, upon the lordships, manors, lands, and tenements of divers owners and possessioners of the same, without the license, consent or agreement of the same owners or possessioners, by the which the said owners and possessioners leese not only their pleasure and disport that they, their friends, and servants, should have about hawking, hunting, and taking of the same, but also they leese the profit and avail that by that occasion should grow to their household, to the great hurt of all lords and gentlemen, and other, having any great livelihood within this realm." It is also laid down by Lord Coke, that seeing the wild beasts do belong to the purlieu man, *ratione soli*, so long as they remain in his grounds he may kill them: for the property, *ratione soli*, is in him. 4 Inst. 304. And in 11 Co. 87 b, it is laid down, that for hawking, hunting, &c., there needeth not any license, but every one may in his own land use them at his pleasure, without any restraint to be made, if not by parliament, as appears by the statutes of 11 H. 7, c. 17, 2 Eliz. c. 10, and 3 Ja. c. 13. These, and the other authorities to the same purport to be found above, have been lately referred to in the Report of the Committee of the House of Commons appointed to take into consideration the laws relating to game; from whence they infer, that all game should be made the property of the person upon whose lands it is found. ||

Thus it appears by the common law, that a property in those living creatures, which by reason of their swiftness or fierceness were not naturally under the power of man, was gained by the mere caption or seizure of them, and that all men had an equal right to hunt and kill them. But, as by this toleration persons of quality and distinction were deprived of their recreations and amusements, and idle and indigent people, by their loss of time and pains in such pursuits, were mightily injured (a), it was thought necessary to make laws for preserving the game from the latter.

(a) || The first act upon this subject, the stat. 13 R. 2, st. 1, c. 13, seems merely a regulation of police to confine the lower class of people from mis-spending their time, in a way that was neither useful to themselves nor to the community. The preamble states, "That divers artificers, labourers, servants, and grooms, keep greyhounds and other dogs, and on the holidays, when good Christian people be at church hearing divine service, they go hunting in parks, warrens, and connigries of lords and others, to the very great destruction of the same; and sometimes under such colour they make their assemblies, conferences, and conspiracies to rise, and disobey their allegiance." Thus, says Mr. Reeves, History, vol. iii. 215, was the safety of the state, as on other occasions, made a reason for imposing the following restrictions: for it was ordained by the above act, that no artificer, labourer, nor any other layman, not having lands or tenements of forty shillings by year, nor priest, nor other clerk, if not advanced to the

## Game.

value of 10*l.* by year, should keep any greyhound, hound, or other dog to hunt; nor use ferrets, hays, nets, hare-pipes, nor cords, nor other engines, to take or destroy deer, hares, conies, nor other gentlemen's game, on pain of a year's imprisonment, to be inquired of by the justices of the peace.||

The statutes to this purpose are very numerous, such as the 11 H. 7, c. 17, against taking pheasants or partridges in another's ground; the 23 El. c. 10, against taking or killing pheasants or partridges in the night, and against hawking in standing or eared corn; the 14 & 15 H. 8, c. 10, against tracing and killing hares in the snow; also those of the 1 Ja. 1, c. 27; 3 Ja. 1, c. 13; 7 Ja. 1, c. 11 and 13; 22 & 23 Car. 2, c. 25; 4 & 5 W. & M., c. 25, for preserving the game, and inflicting penalties on persons destroying thereof.

Those for preserving the young fry of fish, prohibiting the taking them at unseasonable times of the year, &c., such as the 13 E. 1., c. 47; 13 R. 2, c. 19; 17 R. 2, c. 9; (a) 2 H. 6, c. 15; 1 Eliz. c. 17; 5 Eliz. c. 21; 22 & 23 Car. 2, c. 25, § 7, against fishing in the ponds, pools, rivers, &c., of the owners; the 30 Car. 2, c. 9; 4 & 5 W. 3, c. 23, § 5 and 6; 4 & 5 Ann. c. 21; 1 Geo. 1, c. 18; 22 Geo. 2, c. 49; 23 Geo. 2, c. 26.

Vide tit. *Pischary, infra.* (a) Made perpetual by 3 Car. c. 4.

Those against deer-stealers, such as the 19 H. 7, c. 7; 7 Ja. 1, c. 13; 13 Car. 2, c. 10; 3 & 4 W. & M. c. 10; 5 G. 1, c. 15, and c. 28; and 9 G. 1, c. 22, (b) called the Black-Act, by which it is made felony for persons offensively armed, and having their faces blacked, or otherwise disguised, to appear in any forest, park, &c., or in any warren, &c., and hunt, wound, or kill any deer, &c., or steal fish out of any river or pond, &c.

(b) Made perpetual by 31 G. 2, c. 42, § 2.

|| But this last statute is in this respect virtually repealed by 16 G. 3, c. 30, which again is altered, and in part repealed by 43 G. 3, c. 107.

See *R. v. Davies*, 2 East, P. C. § 609.||

The 33 H. 8, c. 6, and 2 & 3 E. 6, c. 14, (c) which enact, That no "person or persons, of what estate or degree he or they be, except he or they in their own right, or in the right of his or their wives, to his or their own uses, or any other to the use of any such person or persons, have lands, tenements, fees, annuities, or offices, to the yearly value of one hundred pounds, shall shoot in any cross-bow, hand-gun, hag-but, or demy-hake, or use to keep in his or their houses, or elsewhere, any cross-bow, hand-gun, hag-but, or demy-hake, otherwise, or in any other manner than is in this act hereafter declared, upon pain to forfeit, for every time that he or they so offend contrary to this act, ten pounds." But by § 2, hand-guns, that are not in the stock and guns of the length of one whole yard, and hag-buts, and demy-hakes, not being three quarters of a yard, are forbidden to all persons, under pain of 10*l.*; and persons having 100*l. per annum* might take such short instruments, or any cross-bows, from persons who had them. And by § 16, any person may carry the offender before the next justice of peace of the county where the offence is committed, who, upon due examination and proof, hath power to commit him till he pay the penalty, &c.

(c) This last statute is repealed by 6 & 7 W. 3, c. 13. For the construction of these statutes vide *Cole's case*, Sir W. Jon. 170; *St. John's case*, 5 Co. 70 b; *Cro. El.* 821, S. C.; *Sanders's case*, 1 Saund. 263; *Vent.* 33, 39, S. C.; 1 Sid. 419, S. C.; 2 Keb. 521, 537, S. C.; *R. v. Alsop*, Sir T. Raym. 378; 4 Mod. 49, S. C.; *R. v. Silcot*, 3 Mod. 280; *Rex et Reg. v. Bullock*, 4 Mod. 147; *R. v. Llewellyn*, 1 Show. 339.||

|| The 2 Ja. 1, c. 27, by which any person keeping greyhounds for the



courseing of deer or hare, or setting dog or net to take pheasants or partridges, except he be seised of an estate of inheritance of the yearly value of 10*l.* above all charges and reprises, or 30*l.* a year of a life-estate, or goods or chattels to the full value of 200*l.*, or be the son of a knight, or baron of parliament, or some other person of higher degree, or the son and heir-apparent of an esquire, is to be committed to jail for three months, unless he forthwith pay 20*s.* for every pheasant, &c., taken or destroyed.

The 3 Ja. 1, c. 13, imposes further restrictions, with respect to deer and conies, upon persons not having hereditaments of 40*l.* a year, nor worth in goods 200*l.*

The 7 Jac. 1, c. 11, § 7, permits freeholders of 40*l.* a year of inheritance in their own or their wives' right, or life-estate of 80*l.* in such right, or worth in goods or chattels 400*l.*, to take pheasants and partridges, in the day-time only, in their own free warrens, &c.||

But the principal statutes relating to this matter are the 22 & 23 Car. 2, c. 25, || reciting, that "divers disorderly persons, laying aside their lawful trades and employments, do betake themselves to the stealing, taking, and killing of conies, hares, pheasants, partridges, and other game intended to be preserved by former laws, with guns, dogs, tramels, lowbels, hays, and other nets, snares, hare-pipes, and other engines, to the great damage of this realm, and prejudice of noblemen, gentlemen, and lords of manors and others, owners of warrens;" it is enacted, "that all lords of manors, or other royalties (*a*), not under the degree of an esquire, may from henceforth, by writing under their hands and seals, authorize one or more gamekeeper, or gamekeepers, within their respective manors or royalties, who, being thereunto so authorized, may take and seize all such guns, bows, greyhounds, setting-dogs, lurchers, or other dogs to kill hares or conies, ferrets, tramels, lowbels, hays or other nets, hare-pipes, snares, or other engines for the taking and killing of conies, hares, pheasants, partridges, or other game, as within the precinct of such respective manors shall be used by any person or persons who, by this act, are prohibited to keep or use the same: And moreover, that the said gamekeeper or gamekeepers, or any person or persons, being thereunto authorized, by warrant under the hand and seal of any justice of the peace of the same county, division, or place (*b*), may, in the day-time, search the houses, out-houses, or other places of any such person or persons by this act prohibited to keep or use the same, as upon good ground shall be suspected to have or keep in his or their custody any guns, bows, greyhounds, setting-dogs, ferrets, coney-dogs, or other dogs to destroy hares, or conies, hays tramels, or other nets, lowbels, hare-pipes, snares, or other engines, aforesaid, and the same, and every or any of them, to seize, detain, and keep to and for the use of the lord of the manor or royalty where the same shall be so found or taken; or otherwise to cut in pieces or destroy, as things by this act prohibited to be kept by persons of their degree."

(*a*) The lord of a hundred or wapentake cannot, as such, appoint a gamekeeper. *Earl of Ailesbury v. Pattison*, Dougl. 28. In Com. Dig. tit. *Justices of Peace* (B, 40), Lutw. 1506, is referred to, as showing that a hundred with a leet is a royalty within this statute. But the reporter himself questions it. (*b*) It would seem that the justice himself is not authorized to search. *Briggs v. Evelyn*, 2 H. Bl. 114. It would seem also, that a gamekeeper, or other persons, cannot enter under the search-warrant, but when the house is open. *R. v. Birt*, 2 Keb. 530.||

By § 3, it is enacted and declared, "That all and every person and persons not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value (*a*) of 100*l.* *per ann.* or for

term of life; (b) or having lease or leases of 99 years, or for any longer term, of the clear yearly value of 150*l.* (c) other than the son and heir apparent of an esquire, (d) or other person (e) of higher degree; (g) and the owners and keepers of forests, parks, chases, or warrens, || being stocked with deer or conies for their necessary use, in respect of the said forests, parks, chases, or warrens, || are hereby declared to be persons, by the laws of this realm, not allowed to have or keep for themselves, or any other person or persons, any guns, bows, greyhounds, setting dogs, ferrets, coney-dogs, lurchers, hays, nets, lowbels, hare-pipes, gins, snares, or other engines aforesaid, but shall be, and are hereby prohibited to have, keep, or use the same." (h)

(a) || If the estate is subject to a mortgage, the interest of which reduces it below this annual value to the mortgagor, it is not a qualification within these acts: but possession is *prima facie* evidence of property, and the defendant must be presumed to be the entire owner: the task lies on the other party to make proof to the contrary. *Wetherell v. Hall*, Cald. 230. A declaration by the defendant before the commissioners of income tax, that he had not an income of 100*l.* a year, and that interest-money was payable out of his estate, is evidence of his want of qualification, in opposition to evidence of his having an estate worth 100*l.* a year. *R. v. Clarke*, 8 T. R. 220. (b) A life-estate of less than 150*l.* a year is not a qualification; for in construing this act, life-estate is to be coupled with leasehold. *Lowndes v. Lewis*, Cald. 188. A church living is merely a life-estate. *Id.* (c) An estate of 150*l.* for 99 years, if three lives shall so long live, is sufficient. *Earl Ferrers v. Henton*, 8 T. R. 506. (d) What constitutes an esquire is somewhat unsettled. In the case of *Jones v. Smart*, 1 T. R. 44, a captain in the army or navy is considered as an esquire for the purposes of this act. But a commission of captain of volunteers, signed only by the lord-lieutenant of the county, styling the person an esquire, does not confer that degree. For though the statute 44 G. 3, c. 34, § 26, enacts that all officers in corps of volunteers, having commissions from lieutenants of counties, shall rank with the officers of his Majesty's regular forces, yet that means only the same military rank. The lord-lieutenant of the county cannot confer honours. *Talbot v. Eagle*, 1 Taunt. 410. (e) This means the son of some other person of higher degree, and not such person himself, who is not qualified merely as being of such higher degree. *Jones v. Smart*, 1 T. R. 44. (g) Doctors in the three learned professions are of higher rank than esquires; but a diploma from a Scottish university does not give a qualification for this purpose. *Id.* (h) The keeping or using of hounds not being prohibited by this clause, a gamekeeper cannot seize a dog of that description. *Grant v. Hulton, Barn. & Alders*. 134. ||

|| By stat. 4 & 5 W. & M. c. 23, § 10, reciting, "That great mischiefs do come by inferior tradesmen, (a) apprentices, and other dissolute persons neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves, and damage of their neighbours; for remedy thereof it is enacted, that if any such person as aforesaid shall presume to hunt, (b) hawk, fish or fowl, (unless in company with the master of such apprentice, duly qualified by law,) such person or persons shall be subject to the penalties of this act, and shall or may be sued and prosecuted for their wilful trespass in such their coming on any person's land, and if found guilty thereof, the plaintiff shall not only recover his damages thereby sustained, but his full costs (c) of suit; any former law to the contrary notwithstanding."

(a) Who is an inferior tradesman or dissolute person within this act, is unsettled. In *Buxton v. Mingay*, 2 Wils. 70, the court were equally divided whether a surgeon and apothecary, not qualified to kill game, was such. That a qualified person cannot be deemed such seems to be determined. *Reg. v. George*, 6 Mod. 40. But see *Bennett v. Talbois*, 1 Ld. Raym. 49; *Com. Rep.* 26, S. C. And it hath been holden, that a huntsman, hunting with his master's hounds, and by his orders, though not in his presence, is not a dissolute person within this clause. *Pallant v. Roll*, 2 Bl. Rep. 900. If a person be found to be an inferior tradesman, his having hunted in company with a qualified person will not protect him. *Wickham v. Walter, Barnes*, 125. (b) It is not necessary to allege or prove that the defendant killed any game, or that he hunted un-

lawfully, hunting alone being sufficient, and there being no distinction in this act between lawful and unlawful hunting. *Shadow v. Painter*, Carth. 424; *R. v. Chipp*, 2 Str. 711. (c) To entitle himself to such costs, the plaintiff must prove not only that the defendant is an inferior tradesman, but also that particular species of tradesmen alleged in the declaration, though under a *videlicet*. *Dickenson v. Pearson*, 1 Hull. 93.||

By the 5 Annæ, c. 14, it is enacted, "That any higlar, chapman, carrier, innkeeper, victualler, or alehouse-keeper shall have in his or their custody or possession, any hare, pheasant, partridge, moor, heath game or grouse, or shall buy, sell, or offer to sell any hare, pheasant, partridge, moor, heath game or grouse, every such higlar, &c., (unless such game, in the hands of such carrier, be sent up by a person or persons qualified to kill the game,) shall upon every such offence be carried before some justice of the peace for the county, riding, city, or town corporate, or liberties, where the said offence is committed: and if upon view, or upon the oath of one or more credible witnesses, shall be convicted of the same, shall forfeit for every hare, pheasant, partridge, moor, heath game or grouse, the sum of 5*l.*, one half to the informer, and the other half to the poor of the parish (a) where the offence was committed: the same to be levied by distress and sale of the offender's goods, by warrant under the hand and seal of the justice or justices of the peace, before whom such offender or offenders shall be convicted, rendering the overplus, (if any be,) the charge of distraining being first deducted; and for want of distress, (b) the offender or offenders to be committed to the house of correction for the first offence for the space of three months, without bail or mainprise; and for every such other offence for the space of four months, provided that such conviction be made within three months after such offence committed; and that [*no*] *\*certiorari* shall be allowed to remove any conviction made, or other proceedings of or concerning any matter or thing in this act, into any of the courts at Westminster, upon any pretence whatsoever, unless the party or parties against whom such conviction shall be made, shall, before the allowance of such *certiorari*, become bound to the person or persons prosecuting the same, in the sum of fifty pounds, with such sufficient securities, as the justice or justices of the peace, before whom such offender shall be convicted, shall think fit, with condition to pay unto the prosecutors, within fourteen days after such conviction [*confirmed*] or *procedendo* granted, their full costs and charges, to be ascertained upon their oaths; and that in default thereof, it shall be lawful for the said justice or justices, or other, to proceed for the due execution of such conviction, in such manner as if no such *certiorari* had been awarded.

Made perpetual by 9 Ann. c. 75. By 28 Geo. 2, c. 12, persons selling, or exposing to sale, any game, are liable to the penalties in this act, or higlars, &c., offering game to sell. And by § 2, of the same act, game found in the house or possession of a poulterer, salesman, fish-monger, cook, or pastry-cook, deemed exposing thereof to sale. Forfeitures and penalties to be recovered and applied as directed by the above act of 5 Ann. c. 14. \**[The word no is inserted instead of the words if any, which are in the act, since that word seemeth necessary to make up the sense; and the word confirmed is added for the like reason. And indeed there have been too many inadvertencies in the drawing up of this act; for there is false grammar in no fewer than six places, besides other mistakes. 2 Burn's Just. tit. Game, 253.]* (a) || If a man being in one parish, shoot into another, the offence is committed in the parish in which he stands. *R. v. Alsop*, 1 Show. 239. (b) Trespass will lie against a justice, who, immediately upon conviction, commits a person who has effects which may then be distrained, without endeavouring to levy the penalty on the goods. *Hill v. Bateman*, 2 Str. 710.||

"And for the better discovery of such higlar, (a) chapman, carrier, innkeeper, alehouse-keeper, and victualler, as shall offer to buy or sell any hare, pheasant, partridge, moor, heath game or grouse, it is enacted, That any per-

son that shall destroy, sell, or buy any hare, pheasant, partridge, moor, heath game or grouse, and shall within three months make discovery of any higlar, chapman, carrier, innkeeper, alehouse-keeper, or victualler, that hath bought or sold, or offered to buy or sell, or had in his possession, any hare, pheasant, partridge, moor, heath game or grouse, so as any one shall be convicted of such offence in manner as aforesaid, such discoverer to be discharged of the pains and penalties hereby enacted for killing or selling such game as aforesaid, shall receive the same benefit or advantage as any other informer shall be entitled to, by virtue of this act, for such discovery and information."

(a) [A poulterer is not a chapman within the meaning of this statute. *Kearle v. Boulter*, Say. Rep. 191.]

And it is further enacted, "That if any person or persons, not qualified by the laws of this realm so to do, shall keep or use any greyhounds, setting dogs, hays, lurchers, tunnels, or any other engines to kill or destroy the game, and shall be thereof convicted upon the oath (a) of one or two credible witnesses, by the justice or justices of the peace where such offence is committed as aforesaid, the person or persons so convicted shall forfeit the sum of five pounds; one half to be paid to the informer, and the other half to the poor of the parish where the same was committed; the same to be levied by distress and sale of the offender's goods, by warrant under the hand and seal of such justice or justices, before whom such person or persons shall be convicted as aforesaid; and for want of such distress, the offender or offenders shall be sent to the house of correction for the space of three months for the first offence, and for every such other offence four months; and that it shall and may be lawful to and for any of her majesty's justices of the peace in their respective counties, ridings, cities, towns corporate, or liberty, and the lords and ladies of his, her, their, or any of their respective manors, within the said manors, to take away any such hare, pheasant, partridge, moor, heath game or grouse, or any other game, from any such higlar, chapman, innkeeper, victualler, or carrier, or any other person or persons not qualified to kill the same, as shall be found in their custody or possession; and likewise to take away such dogs, (b) nets, or other engines, which shall be in the power or custody of any person or persons not qualified by the laws to keep the same, to their own proper use, without being accountable to any person or persons for the same; and that it shall and may be lawful for any lord or lady of his or her respective lordship or manor, by writing under his or her hand and seal, to empower his or her gamekeeper or (c) gamekeepers upon his or her own lordship or manor as aforesaid, to kill hare, pheasant, partridge, or any other game whatsoever; but, if the said gamekeeper shall, under colour or pretence of the said power and authority to kill or take the same for the use of such lord or lady, afterwards sell or dispose thereof, to any person or persons whatsoever, without the consent or knowledge of the lord or lady of such manor or manors that hath given such power or authority in manner as aforesaid, and shall be thereof convicted, upon the complaint of such lord or lady of any manor, and upon the oath of one or more credible witnesses, before any one or more of her majesty's justices of the peace as aforesaid, upon such conviction, such gamekeeper shall be committed to the house of correction for the space of three months, there to be kept to hard labour."

(a) || The defendant may be convicted also on his own confession. *R. v. Gage*, 1 Str. 546; 8 Mod. 64, S. C. || (b) || A magistrate who convicts a person under this act of killing game, and causes his dog to be brought for the purpose of seizing it, may order

the dog to be killed without any formal adjudication of seizure. *Kingsnorth v. Bretton*, 5 Taunt. 416. || (c) Vide the 9 Ann. c. 25, by which it is enacted that no lord or lady of a manor, shall make or appoint above one person to be a gamekeeper within any one manor, whose name shall be entered with the clerk of the peace. &c. And by 3 G. 1, c. 11, it is enacted, that no lord or lady of any manor shall make or constitute any person to be gamekeeper, with power and authority to take and kill hare, pheasant, partridge, or any other game whatsoever, unless such person be qualified by the laws of this realm so to do, or unless such person be truly and properly a servant to the said lord or lady, or such person be immediately employed and appointed to take and kill the game for the sole use and benefit of the said lord or lady, &c. || But this statute was repealed by 48 G. 3, c. 93, by which any lord or lady of any manor is empowered to appoint any person, whether qualified or not, to be a gamekeeper to his or her manor, and to kill game for the use of any person; but it is to be specified in the deputation whether qualified or not; and such person is invested with all the privileges of a gamekeeper appointed under former acts. The stat. 48 G. 3, c. 55, § 9, which relates to the certificate, enacts, that no gamekeeper shall thereby be enabled to use any dog or engine out of the precincts of the manor or royalty, for which such deputation was granted. || [It had been determined in *Rogers v. Carter*, M. 9 G. 3, 2 Wils. 387, that a lord of a manor may appoint a gamekeeper, with power to kill game, though *he* is neither a person qualified, nor a menial servant of the lord; and such gamekeeper hath a right to carry a gun anywhere, though out of the manor; and though he kills game, or sports out of the manor, his gun cannot be taken from him; but, if he kills game out of the manor, he is liable to the penalty. || A gamekeeper regularly appointed is to be presumed, in an action for the penalty under these laws, to have killed game for the use of the lord, if nothing appear to the contrary. *Spurrier v. Vale*, 10 East, 413. || [Though it is a rule of law not to permit a question respecting the boundaries of a manor to be discussed in an action on the game-laws; *Calcraft v. Gibbs*, 4 T. R. 681, and *Hawkins v. Bailey*; and *Blunt v. Grimes*, there cited; yet it is no defence to such an action that the defendant acted as gamekeeper under a deputation from a person claiming to be lord of the manor, if there appear to be no ground for the claim. *Calcraft v. Gibbs*, *ubi supra*, and 5 T. R. 19; 8 East, 177.

By the 9 Ann. c. 25, § 2, it is enacted, "That if any hare, pheasant, partridge, moor, heath game or grouse shall be (a) found in the shop, house, or possession of any person or persons whatsoever not qualified, in his own right, to kill game, or being entitled thereto under some person so qualified, the same shall be adjudged, deemed, and taken to be an exposing thereof to sale within the true intent and meaning of this and the statute 5 Ann. c. 14." (b)

(a) [In an action therefore upon this statute for exposing a hare to sale, it is sufficient to allege, that the defendant had a hare in his possession, though objected, that the statute made it only evidence of an exposing to sale. *Jones v. Bishop*, Say, Rep. 64.] || It is scarcely necessary to say, that a servant employed to detect poachers, taking up a hare killed by strangers, for the purpose of carrying it to the lord, has not such a possession as will subject him to a penalty. *Warnford v. Kendall*, 10 East, 19. (b) By reference to the statute of Ann. the penalty is incurred for every hare, &c. *Bluet v. Needs*, Com. Rep. 522. ||

§ 3. "If any person or persons whatsoever shall take, kill, or destroy any hare, pheasant, partridge, moor, heath game or grouse, in the night-time, the person or persons so offending shall likewise, for every such offence, incur such forfeitures, pains, and penalties, to be recovered by such means, within such time, and to such uses as directed by the stat. 5 Ann.

For the punishing of persons who unlawfully hunt or take any red or fallow deer in forests or chases, or who beat or wound keepers or other officers in forests, chases, or parks; or for more effectually securing the breed of wild fowl, see 10 Geo. 2, c. 32, § 9, 10. Made perpetual by 31 Geo. 2, c. 42, § 5, as to § 9. For the preservation of the game in Scotland, see 24 Geo. 2, c. 34. For preventing the burning or destroying of goss, furze, or fern, in forests or chases, see 28 Geo. 2, c. 19, § 3.

Also by the said statute, 9 Ann. c. 25, § 4, reciting, "That very great numbers of wild fowl of several kinds are destroyed by the pernicious practice

of driving and taking them with hays, tunnels, and other nets, in the fens, lakes, and broad waters, where fowl resort in the moulting time; and that at the season of the year when the fowl are sick and moulting their feathers, and the flesh unsavoury and unwholesome, to the prejudice of those who buy them, and to the great damage and decay of the breed of wild fowl; it is enacted, 'That if any person or persons whatsoever, between the first day of July and the first day of September, as they shall yearly happen, shall by hays, tunnels, or other nets, drive and take any wild duck, teal, widgeon, or any other fowl, commonly reputed water-fowl, in any of the fens, lakes, broad waters, or other places of resort for wild fowl in the moulting season, such person or persons who shall so offend, and thereof shall be convicted before any one or more of her majesty's justices of the peace for the county where such offence shall be committed, by the oath of one or more credible witnesses, shall, for every wild duck, teal, or other water fowl so taken as aforesaid, forfeit and pay the sum of five shillings; one moiety thereof to be paid to the informer, and the other moiety to the poor of the parish where such offence shall be committed; the same to be levied by distress and sale of the offender's goods, by warrant under the hand and seal of the justice and justices of the peace before whom the offender shall be convicted, rendering the overplus, if any be, above the penalty and charge of the distress; and for want of distress the offender shall be committed to the house of correction for any time not exceeding one month, nor less than fourteen days, there to be whipped and kept to hard labour; and the justice or justices of the peace, before whom such person or persons so offending shall be convicted, shall order such hays, nets, or tunnels, that were used in driving and taking the said wild fowl as aforesaid, to be seized and immediately destroyed in the presence of such justice or justices.'

By a clause in the mutiny acts, "for the better preservation of the game in or near such place where any officers or soldiers shall at any time be quartered, it is enacted, That if any officer or soldier shall, without leave of the lord of the manor, under his hand and seal, first had and obtained, take, kill, or destroy any hare, coney, pheasant, partridge, pigeon, or any other sort of fowls, poultry, or fish, or his majesty's game within the united kingdom of Great Britain and Ireland; and upon complaint thereof shall be, upon oath of one or more credible witness or witnesses, convicted before any justice or justices of the peace, who is and are hereby empowered and authorized to hear and determine the same, (that is to say) every such officer so offending shall, for every such offence, forfeit the sum of five pounds to be distributed among the poor of the place where such offence shall be committed; and every officer commanding in chief upon the place, for every such offence committed by any soldier under his command, shall forfeit the sum of twenty shillings, to be paid and distributed in manner aforesaid; and if upon such conviction made by the justices of the peace, and demand thereof also made by the constable or overseers of the poor, such officer shall refuse or neglect, and not within two days pay the said respective penalties, such officer so refusing or neglecting shall forfeit, and is hereby declared to have forfeited his commission, and his commission is hereby declared to be null and void."

By the 8 Geo. 1, "for rendering more effectual the laws now in being for the better preservation of the game, it is enacted, That wheresoever any person shall, for any offence to be hereafter committed against any

law now in being, for the better preservation of the game, be liable or subject to pay any pecuniary penalty or sum of money, upon conviction before any justice or any justices of the peace, it shall and may be lawful for any other person whatsoever, either to proceed to recover the said penalty by information and conviction before a justice or any justices of the peace, in such manner as is in such law contained, or to sue for the same by action of debt, or on the case, bill, plaint, or information, in any of his majesty's courts of record, wherein no *essoin*, protection, wager of law, or more than one imparlance, shall be allowed, and wherein the plaintiff, if he recovers, shall likewise have his double costs.

By 26 Geo. 2, c. 11, suits for the recovery of pecuniary penalties for offences committed after 25 March, 1753, against the game-laws, may be brought before the end of the second term after the offence committed.—Any person may sue within six months after the offence, for the whole penalty, (though the same be given to the poor,) to his own use, and have double costs. Stat. 2 Geo. 3, c. 19. || The six months are *lunar* months; but it is not necessary to aver in the declaration, that the action was commenced within six months; and if alleged to be within six *calendar* months, it is no objection. *Lee v. Clarke*, 2 East, 333. The action may be brought against several, and the verdict taken against some, and the others acquitted. *Hardyman v. Whitaker*, 2 East, 573.||

“Provided, That all suits and actions to be brought by force of this act, shall be brought before the end of the next term after the offence committed, and that no offender against any of the laws now in being, for the better preservation of the game, shall be prosecuted for the same offence, both by the way prescribed by this law, and by the way prescribed by any of the said former laws; and, that in case of any second prosecution, the person so doubly prosecuted, may plead in his defence the former prosecution pending, or the conviction or judgment thereupon had.”

*Vide supra.*

\*By 2 Geo. 3, c. 19, none shall take, kill, or have any partridge, from February 12 (*a*) to September 1, or pheasant, from February 1 to October 1, (except taken in lawful time, and kept in a mew,) or any black game from January 1 to August 20, or grouse, from December 1 to July 25, on pain of 5*l.* *per* bird.

(*a*) || Altered by Geo. 3, c. 34, to 1st February, as to partridges.||

All penalties on the game laws, sued for in Westminster-Hall, shall go to the informer, and no part to the poor of the parish.

By 13 Geo. 3, c. 55, None shall kill or have black game from December 10 to August 20, or grouse, from December 10 to August 12, on pain from 20*l.* to 10*l.* for the first, and from 30*l.* to 20*l.* for subsequent offences, by suit or before a justice.

By 28 Geo. 2, c. 12, Every person, qualified or not, who offers to sale game, is liable to the penalties on higlars, &c., offering to sale, by 5 Ann. c. 14. And game found in possession of a poulterer, &c., is deemed exposing to sale.

By 58 Geo. 3, c. 75, no person, whether qualified or not, shall buy any hare, pheasant, partridge, moor, heath, game or grouse, under a penalty of five pounds for every hare, pheasant, &c. so bought.

By 13 Geo. 3, c. 80, Persons killing hare, pheasant, &c., or using gun, dog, engine, &c., to kill or take, between *seven* at *night* and *six* in the *morning*, from October 12 to February 12; and between *nine* at *night* and *four* in the *morning*, from February 12 to October 12, convicted before one justice, forfeit for the first offence from 20*l.* to 10*l.*, and for

the second from 30*l.* to 20*l.* and costs, or, for want of distress, shall be committed for three months; and for offence after second conviction shall be committed till the quarter session, or give surety to appear to indictment, and if convicted forfeit 50*l.* and costs, or, for want of distress, committed from *twelve to six months*, and publicly whipped. Half the forfeiture to the informer, and half to the poor.

Killing, or using an engine on Sunday, or Christmas-day, liable to the like penalty. The justice where the offence is committed may grant a warrant to be endorsed by a justice in another county where the offender lives, and the offender thereby be brought before the first justice, or distress be made. An appeal is given, but no *certiorari*.

By 10 Geo. 3, c. 18, A person stealing any dog, or receiving it, knowing it to be stolen, convicted before *two justices*, forfeits from 30*l.* to 20*l.* or imprisonment from *twelve to six months*; and for the second offence from 50*l.* to 30*l.* or from *eighteen to twelve months'* imprisonment, and whipping. An appeal is final, and there is not any *certiorari*.

[It hath been determined, that in an information on the acts of 22 & 23 Car. 2, c. 25, and 5 Ann. c. 14, not only the qualifications must be all negatively set out, but (*a*) that the time when the offence was committed must also be stated.

Rex v. Marriot, 1 Str. 66; R. v. Hill, 2 Ld. Raym. 1415; R. v. Jarvis, 1 Burr. 148; 1 T. R. 643, n. S. C.; Bluet v. Needs, Com. Rep. 522; R. v. Wheatman, Dougl. 331; R. v. Earnshaw, 15 East, 456. (*a*) R. v. Pullen, 1 Salk. 369; R. v. Chandler, Ibid. 378; R. v. Simpson, 10 Mod. 248. In an *action*, however, it is enough to state that the defendant was not duly qualified. Bluet v. Needs, Com. Rep. 522. || In R. v. Crowther, 1 T. R. 125, the court seemed to think that it was necessary in a conviction, that the *evidence* should negative every particular qualification; but, as the conviction was quashed on another point, the question, whether in such a case it was necessary to give any evidence of want of qualification, was not entered into. But in R. v. Stone, 1 East, 639, this question came directly before the court, when the judges were equally divided; Lord Kenyon and Grose, J., being of opinion that in a conviction some evidence of want of qualification must be given; Lawrence, J., and Le Blanc, J., on the contrary, that the proof of qualification lay on the defendant. ||

In a conviction for deer-stealing, the county where the offence was committed was mentioned only in the information, and not in the evidence of the witnesses; and therefore that not appearing to be proved, the conviction was quashed.

Anon. cited in 2 Ld. Raym. 1387.

A conviction on the 5 Ann. set out the vill, but not the parish wherein the offence was committed: upon motion to quash it for this defect, a part of the penalty being given to the poor of the parish; the court said, if there was a parish of the same name with the vill, they would intend it to be co-extensive with it; if the vill was extraparochoial, then the informer was entitled to the whole penalty.

R. v. Wyatt, 2 Ld. Raym. 1478.

A conviction for deer-killing will be quashed, if made upon the evidence of the informer.

R. v. Stone, 2 Ld. Raym. 1545.

A conviction for keeping (only) a lurcher is good, for the bare keeping of it is evidence of the purpose for which it is kept. So of hare-pipes, and such like, which are peculiarly fitted for the killing of game. But it is not so in the case of a gun, for the keeping of a gun is an ambiguous act: in order therefore to bring the party keeping it within the statute, it must be



shown that it was kept for the purpose of killing game. However, a conviction (a) that the defendant *kept and used a gun to kill and destroy the game*, hath been solemnly adjudged to be sufficient. || (b) And proof that he “did keep and use a gun with intent to kill and destroy the game,” is sufficient to support the conviction, though the witness may allege a very insufficient reason for imputing such intent to him.||

R. v. Filer, 1 Str. 497; R. v. Gardner, 2 Str. 1084; Wingfield v. Stratford, 1 Wils. 315. (a) R. v. Thompson, 2 T. R. 18; R. v. Pearse, 9 East, 358, *acc.* || (b) Rex v. Davis, 6 T. R. 177.||

[In an action on the 5 Ann. c. 14, for keeping and using a dog to kill the game, it must be shown what sort of a dog it was; that it may appear whether it were one of the dogs mentioned in the statute; for this being a penal law shall not be extended by equity; in an action therefore for using a *hound*, the judgment was reversed, the word *hound* not being to be met with in the statute.

Reason v. Lisle, Com. Rep. 575; Hooker v. Wilks, 2 Str. 1126.]

|| A conviction for keeping and using a dog *called a greyhound*, is positive enough. So, for keeping and using a dog *called a lurcher*.

R. v. Hartley, Cald. 175; R. v. Earnshaw, 15 East, 456.

It seems to have been thought, in one case, that the mere keeping of a greyhound was sufficient. But in a later case, in an action for keeping a setting-dog, there being no evidence of the dog, which was still young, having been used for the purpose of killing game, it was ruled, that the action could not be supported.

R. v. Hartley, Cald. 175; Read v. Phelps, 15 East, 271.||

[It hath been adjudged that a conviction *super præmissis* for three penalties of 5*l.* each for killing three hares, where it appears that all was done in the same day, is bad, for the statute does not give 5*l.* for every hare, it being all but one offence.

Marriot v. Shaw, Com. Rep. 274; Ld. Mansfield in the case of Cripps v. Durden, Cowp. 646, declared, that “killing a single hare was an offence; but that killing ten more in the same day would not multiply the offence, or the penalty imposed by the statute for killing one.” See a similar decision on this point in the case of Reg. v. Matthews, 10 Mod. 26, and see 3 T. R. 510.]

|| A person can be convicted in only one penalty for keeping and using a gun, and also a dog, on the same day.

R. v. Lovet, 7 T. R. 152.

[Two or more persons cannot be convicted in separate penalties under 5 Ann. for using a greyhound to destroy game, for it is only one offence.

Rex v. Bleasdale, 4 T. R. 809.]

|| But a defendant may be convicted of several offences in the same conviction.

R. v. Swallow, 8 T. R. 284.||

If unqualified persons sporting with a qualified man are his servants, or act as such upon that occasion, they are not subject to the penalties of these acts. Such persons neither keep nor use the dogs, &c. But as they claim protection under a qualified person, strict proof of his qualification will be required of them.

R. v. Taylor, 15 East, 460; Lewis v. Taylor, 16 East, 49; Clarke v. Broughton, 3 Campb. 328.

A lord of a manor is qualified, as such, to sport within his own manor;

but, if he has no other qualification, he will be liable to the same penalties with any other unqualified person, if he sport out of his manor.

*Mallock v. Eastley*, 7 Mod. 482; 1 Chitty, 42.||

[It is not to be forgotten that none of the above statutes *qualify* any one, except in the instance of a gamekeeper, to kill game: the circumstance of having 100*l. per ann.* and the rest, are not properly qualifications, but exemptions, and the persons, so exempted from the penalties of the game statutes, are not only liable to actions of trespass by the owners of the land, but also if they kill game within the limits of any royal franchise, they are liable to the actions of such as may have the right of chase or free warren therein.

2 Bl. Com. 418.]

One who finds game on his own land cannot justify pursuing it into the land of another.

*Deane v. Clayton*, 7 Taunt. 489; 1 Moo. 203.

*Quære*, Whether the owner of land who sets dogspears thereon for the destruction of foxes and dogs following game on the land, and sticks up notice of their being set, is answerable to the owner of a dog which trespasses on the land and is killed by one of the dogspears?

1 Moo. 203.

If a person has notice that spring-guns are set in a wood, and afterwards trespasses there, and is injured by a spring-gun, it is clear he cannot recover compensation from the owner who set the guns. *Quære*, Whether he could sue if he had no notice?

*Hott v. Wilkes*, 3 Barn. & A. 304.

But now by 7 & 8 G. 4, c. 18, § 1, it is enacted and declared, that if any person shall set any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person, the person so setting, &c., shall be guilty of a misdemeanor.

By § 3, persons permitting any such spring-gun, &c., set by others to continue set, shall be construed to have set the same with intent as aforesaid.

By § 4, the act is not to apply to spring-guns, &c., set from sunset to sunrise in a dwelling-house for the protection thereof; nor (by § 2) shall extend to make it illegal to set guns or traps usually set to destroy vermin.

The grantee under a deed of conveyance executed to give a colourable qualification to kill game, may maintain ejectment on it against the grantor, for the latter cannot set up his own fraud as a defence.

*Doe v. Roberts*, 3 Barn. & Ald. 367.

The lord or lady of a manor cannot delegate to a gamekeeper a general discretionary power to seize game in the hands of unqualified persons under the statutes of Car. 2, and Ann.; but they must themselves exercise their judgment on the particular case as to whether the person is unqualified or not.

*Bird v. Dale*, 7 Taunt. 560; 1 Moo. 290.

In an action against a gamekeeper for a penalty for using a gun to kill game without being qualified; evidence of the real title to the manor is

Game.

admissible for the purpose of negating the existence of a colourable title in the person under whom the defendant claims to act.

Hunt v. Andrews, 3 Barn. & Ald. 341.

An unqualified person setting a trap for hares by order and in presence of his master, and on his master's ground, and finding a hare caught, taking it to his master according to a general order, is not liable to the penalties of the 5 Ann. c. 14, § 4, and 9 Ann. c. 25, § 2, for using snares to destroy game, or for having game in his possession.

Walker v. Mills, 2 Bro. & Bing. 1; 4 Moo. 343.

To constitute the offence of keeping a setting dog within the 5 & 6 Ann. c. 14, § 4, the dog must be kept for the purpose of destroying game; and if it appear that at the time of the offence charged he is tied up, there is no offence.

Hayward v. Horner, 5 Barn. & Ald. 317.

A conviction for this offence must be made within three months after the offence committed.

Rex v. Tolley, 3 East, 467; Rex v. Bellamy, 1 Barn. & C. 500.

On a conviction on the 5 Ann. c. 14, § 2, against a carrier for having game in his possession, it has been held sufficient if the information and adjudication negative the qualifications in statute 22 Car. 2, c. 25, without negating them in evidence.

Rex v. Turner, 5 Maule & S. 206.

But it has been since held, that it is not necessary in such case against a carrier even to *aver* that the defendant was unqualified; for, according to the statute, the carrier having game of an *unqualified* person in his possession is guilty of the offence, whether qualified or not himself.

Rex v. Marsh, 2 Barn. & C. 717.

It is however necessary to aver non-qualification in informations for killing game; but it seems (on the principle of Rex v. Turner) that the negative need not be proved by the prosecutor.

Rex v. Stone, 1 East, 639.

An information for penalties under the game laws is not an information within the meaning of the 48 G. 3, c. 58, whereby if the defendant neglect to appear and plead, the prosecutor may enter an appearance and plea for him; for the statute only applies to such indictments and informations as *must* be brought in the Court of King's Bench.

Davies v. Bint, 3 Barn. & C. 586.

Grouse are not birds of warren.

Devonshire v. Lodge, 7 Barn. & C. 36.

Though a person be not qualified to keep or kill game, yet he may have a sufficient possession of animals coming under that description to support an indictment for stealing them.

Jones's case, 3 Burn. Just. *Larceny*; Russ. on Cri. 152, (2d edit.)

By 57 G. c. 90, § 1, if any person having entered into any forest, chase, park, wood, plantation, close, or other open or enclosed ground, with intent illegally to destroy, take, or kill game or rabbits, or to aid others therein, shall be found at night, *i. e.* between six in the evening and seven in the morning, from the 1st of October to the 1st of February; between seven in the evening and five in the morning, from the 1st of February

to the 1st of April; and between nine in the evening and four in the morning for the remainder of the year, armed with any gun, cross-bow, fire-arms, bludgeon, or other offensive weapon, every person so offending shall be guilty of a misdemeanor, and sentenced to transportation for seven years, or shall receive such other punishment as may be inflicted on persons guilty of misdemeanor.

57 G. 3, c. 90, § 1, now repealed. *Vide infra*.

On this statute it is held, that if several are together, and any one of them is armed, the others are liable to be convicted under the act, unless *indeed* the others are ignorant of their companion having arms.

Rex v. Smith, Russ. & Ry. 368; Rex v. Southern, *Ibid*. 444.

Perceiving a person fire is finding him armed, though his person is not seen at the time.

Rex v. Nash, Russ. & Ry. 386.

It is not sufficient in the indictment to state that the defendant entered into a *certain close* or a *certain enclosed ground*, without specifying it with name or abutments, &c.

Rex v. Ridley, Russ. & Ry. 515.

A person convicted under the 57 G. 3, c. 90, of being found armed in a forest, chase, park, wood, or plantation, may be sentenced to hard labour under the 3 G. 4, c. 114, for all these places are "open or enclosed ground" within the meaning of the latter statute.

Rex v. Parkhurst, Russ. & Ry. 503.

The 57 G. 3, c. 90, is now repealed by the 9 G. 4, c. 69, except as far as it repeals any former acts; and it is thereby enacted, that if any person shall, by night, unlawfully take or destroy any game or rabbits in any land, whether open or enclosed, or shall, by night, unlawfully enter or be in any land, whether open or enclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game, such offender shall, on conviction before two justices, be committed for the first offence, to the common jail or house of correction, for any period not exceeding three calendar months, there to be kept to hard labour; and at the expiration to find sureties by recognisance, himself in 10*l.*, and two sureties in 5*l.* each, or one surety in 10*l.*, for not so offending again for one year; and in case of not finding sureties, shall be further imprisoned and kept to hard labour for one year, unless such sureties are sooner found; and if he offend a second time and be convicted before two justices, he shall be committed to the common jail or house of correction for any period not exceeding six calendar months, and to find sureties, himself in 20*l.*, and two sureties in 10*l.* each, or one surety in 20*l.*, for his not so offending again for two years; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for one year, unless sureties are sooner found: and in case he offend again, he shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for seven years, or to be imprisoned and kept to hard labour for any term not exceeding two years.

By § 2, owners or occupiers of land, or any person having a right of free chase or free warren thereon, or the lord of the manor, or their game-keepers or servants, may apprehend such offenders and deliver them to a peace officer; and in case the offender shall assault, with any gun or other offensive weapon, any person authorized to seize him, he shall be guilty of

a misdemeanor, and liable to be transported for seven years or imprisoned for two years.

By § 9 G. 4, c. 69, § 4, the prosecution for every offence punishable on summary conviction shall be commenced within six calendar months from the time of the offence; and the prosecution for every offence punishable on indictment within twelve months.

Section 5 gives a form of conviction.

By § 6, an appeal is given, in cases of summary conviction, to the quarter sessions.

By § 7, no such conviction or adjudication on appeal shall be quashed for want of form, or removed by *certiorari*.

By § 9, any persons, to the number of three or more, together by night, unlawfully entering or being in any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, firearms, bludgeon, or any other offensive weapon, shall be guilty of a misdemeanor, and liable to be transported for not exceeding fourteen years, or imprisoned for not exceeding three years.

By § 12, for the purpose of this act, night shall be considered to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise.

By § 13, for the purposes of this act, "game" shall include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

Where an indictment on the ninth section of the above act alleged that the parties did by night unlawfully enter divers closes, &c., and were *then and there*, in the said closes, &c., armed with guns for the purpose of destroying game, it was held, that it did not sufficiently appear that the defendants were, *by night*, in the closes, armed for the purpose of destroying game, and the judgment was reversed.

Davies v. Rex, 10 Barn. & C. 89.

In an action for penalties on the game laws limited to be brought within six months, by 2 G. 2, c. 19, § 6, if the defendant goes to trial without having obtained a particular of the penalties meant to be proceeded for, the plaintiff is entitled to recover in respect of an offence committed within six months from the commencement of the action, although not proved to have been known to him till six months after its commission, and it is not a question for the jury whether the action was brought for that offence.

Rushworth v. Craven, 1 McClell. & Y. 417.

If a gentleman sends out his hounds and his servants, and invites other gentlemen to hunt with him, although he does not himself go on the land of another, but those other gentlemen do, he is answerable for the trespass they commit, unless he desire them not to go on those lands.

Baker v. Berkeley, 3 Carr. & P. Ca. 32.

The statute 58 G. 3, c. 75, prohibits the buying of pheasants in all cases, and, therefore, by a contract for the sale of live pheasants no property passes to the purchaser.

Helps v. Glenister, 8 Barn. & C. 553.||

## GAMING.

(A) How far restrained by the Common Law.

(B) How far restrained by Statute.

(A) How far restrained by the Common Law.

It seems that by the common law, the playing at cards, dice, &c., when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful, nor punishable as any offence whatsoever.

2 Vent. 175; 5 Mod. 13; Salk. 100. See the preamble to the statute 16 Car. 2, c. 7.

Also it is agreed, that a person who wins money at gaming may maintain a special *indebitatus assumpsit* for it; for the contract is not (a) unlawful in itself, and the winner's venturing his money is a sufficient consideration to entitle him to the action.

3 Lev. 118; 6 Mod. 128; 2 Ld. Raym. 1034; 3 Salk. 14, 175; Holt, 329; 12 Mod. 81; 2 Show. 82; Carth. 336; 5 Mod. 13; Vent. 175. [With respect to wagers, in general they may be considered as legal, if they are not an incitement to a breach of the peace, or to immorality; or if they do not affect the feelings or interest of a third person, or expose him to ridicule; or if they are not against sound policy. *Da Costa v. Jones*, Cowp. 729; *Atherford v. Beard*, 2 T. R. 610; *Goode v. Elliot*, 3 T. R. 697. "This species of contract," Lord Mansfield in the case here cited, says, "has in fact gone to an extent that is much to be complained of. And whether it would not have been better policy to have treated all wagers originally as gaming contracts, it is now too late to discuss."  $\beta$  See *Bunn v. Riker*, 4 Johns. 426. Wagers fairly won are recoverable, unless founded on a transaction which is immoral, illegal, or indecent. *Morgan v. Richards*, 1 P. A. Browne, 171. But see *Edgell v. McLaughlin*, 6 Whart. 176, where it was ruled that an action could not be maintained to recover the amount of a bet. *g* This better policy prevails in Scotland, and hath lately been sanctioned by a decision of the House of Lords of this country. *Bruce v. Ross*, 14th April, 1788. Printed Cases of the Lords.] (a) And therefore the defendant to an action for money won at play, where the contract is for a sum allowed of by the statutes, must put in special bail. Salk. 100, pl. 10. [But see *Younge v. Moore*, 2 Wils. 67, *contr.*]

But it seems to be the better opinion, that a general *indebitatus assumpsit* will not lie for money won at play, for the contract is executory, (b) and but a wager, which is but a collateral promise; and this action will lie in no case but where debt will lie, (c) which must be on a contract executed, such as labour done, or some other meritorious cause.

Ld. Raym. 69, 89; 6 Mod. 128; Lutw. 180; 5 Mod. 13, and Carth. 338, S. P., where it is said, that the chief reason of this opinion was, because the court would not countenance gaming, by giving such an easy remedy for money won at play, and vide 3 Lev. 118, and Vent. 175, where it seems to have been holden, that such action will lie. (b) But, if the money be staked down the instant that the game is determined, the property is vested in the winner, and it is as much a violation of his right to withhold it from him, as it would be if he had come to it by any other means. 5 Mod. 13. (c) [This position is unfounded. 3 Burr. 1008.]

But an *indebitatus assumpsit* lies against him who (d) holds the wager, because it is a promise in law to deliver it if won.

5 Mod. 13, *per* Holt, C. J. (d) If upon a wager the money is deposited in the hands of a third person, and the determination left to two, and one of them refuses to determine the matter, no action lies on such a wager till the adjudication, and the party may justify

## (A) How far restrained by the Common Law.

the detainer. But, if it happened that the wager became impossible to be determined, as, if the judges died, or the time were past, then the wager dissolves, and each party shall have his money again. *β* The stakeholder must take notice of the winner at his peril. *Thompson v. Crygier*, Opinions in the Mayor's Court, 49; *Simmons v. Borland*, 10 Johns. 468.*g*

And although gaming, in the manner as has been said, may be lawful, yet if a person be guilty of cheating, as by playing with false cards, dice, &c., he may be indicted for it at common law, and confined and imprisoned according to the circumstances of the case and heinousness of the offence.

That a common player of hazard, and using false dice, may be indicted for it at common law, and set in the pillory. 2 Roll. Abr. 78.—So an information against a person for using the game of cock-fighting may be at common law. 3 Keb. 463, 510.

Also, all common gaming-houses are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood.

Hawk. P. C. c. 75, § 6.

Also, from the destructive and pernicious consequences which must necessarily attend excessive gaming, both the courts of law and equity have shown their abhorrence of it. Hence in a case where A came to the house of B and won of him 900*l.* which he carried away, and afterwards won 1500*l.* more, which he had in his possession, but which B and his servants took from him by violence, upon which A brought an action of trespass, the Court of Chancery granted an injunction.

Vern. 489, *Sir Basil Firebrasse v. Bret*: 2 Vern. 71, S. C., where the cause came to a hearing, and the defendant finding that the court inclined so strongly against him, submitted to a proposition made by the counsel, which was afterwards decreed, as by consent; and on this occasion my Lord Chancellor cited the case of *Sir Cecil Bishop and Sir Thomas Staples*, that came before the Lord Chief Justice Hale in the King's Bench, upon a wager won at a horserace, where Lord Hale declared, he would give the defendant leave to imparl from time to time.

So, where one apprentice lost to another 100*l.* at two sittings at whist, 50*l.* of which was paid in ready money; and for the other 50*l.* he gave his bond of 100*l.* penalty, and on a bill to be relieved against it, the Court of Chancery decreed the bond to be delivered up and cancelled, although the defendant insisted by his answer, that he was unwilling and declined playing for so much, and that he was pressed to it by the plaintiff.

2 Vern. 291, *Woodroffe v. Farnham*. And *note*, that by the custom of London, it is a sufficient cause for a master to turn away his apprentice that he frequents gaming; and he may justify it before the chamberlain.

|| Although a court of equity will give no countenance to gaming transactions, yet it has seldom denied to extend its relief against the gamester himself, in behalf of the person injured; as, where two men play on a joint stock, and one holds the stakes and sweeps up the money, he shall answer a moiety of that to his companion. And Lord Chancellor Loughborough held that he would not exclude the result of an illegal contract in decreeing an account; and that in like manner smuggling transactions, and illegal dealings for stock, though the court would not execute the contract, should be brought into an account. And on a bill for an account relating to the profits of a game called E. O., Lord Keeper Henley directed an issue to try whether an agreement to carry on such game, and a contribution, had been made or not.

Eq. Tr. b. 1, c. 4, § 6; *Watts v. Brooks*, 3 Ves. 612; *Nash v. Ash*, 1 Ed. 378.||

(A) How far restrained by the Common Law.

β If a man loses money fairly at play, and voluntarily pays it, he cannot recover it back at common law; nor if the money be won unfairly, and the loser, with a knowledge of all the circumstances, voluntarily pays it.

Whiteside v. Tabb, Cooke 387; McCullum v. Gourlay, 8 Johns. 147.

Although the plaintiff cannot recover on illegal contracts, yet when the illegal transaction has taken place, an agent who has received money on account of his principal, will not be allowed to shelter himself from the payment of it to his principal on the ground of the illegality of the original transaction.

Anderson v. Monerief, 3 Desaus. 132.

A was indebted to B fifty dollars for money won at cards, and B was indebted to C for goods sold and delivered to him previous to that time; B offered to give A a discharge from the debt on condition that he would pay C the amount due to him, upon which C accepted A's note and discharged B. In an action by C against A upon this note, held, that the defendant could not set up the original illegality of the consideration between himself and B, as a defence against C.

Bowen v. Dogget, 2 Nott & McC. 127; Jones v. Sevier, 1 Lit. 50.

In New Hampshire, a wager on a subject in which the parties have no interest but that created by the wager is not a valid contract.

Perkins v. Eaton, 3 N. H. Rep. 152; Hoit v. Hodges, 6 N. H. Rep. 104.

A marker at an illicit billiard table, who keeps the games and receives the money betted by the players, is not entitled to recover wages from the owner of the table, the contract being unlawful.

Badgley v. Beale, 3 Watts, 263.

Wagers against public policy are illegal and void.

Denniston v. Cook, 12 Johns. 376; Yates v. Foot, 12 Johns. 1; Collins v. Ragrew, 15 Johns. 5; Simmons v. Borland, 10 Johns. 468; Zieley v. Warren, 17 Johns. 192; Herd v. Vincent, 1 Tenn. 369; Wroth v. Johnson, 4 Har. & McC. 284; Hook v. Bolster, 3 Har. & McC. 348; Livingston v. Wootam, 1 Nott & McC. 178; Haskett v. Wootan, 1 Nott & McC. 180; Carson v. Rampert, 2 Bay, 560; Morton v. Fletcher, 2 Marsh. 138; Clarke v. Havens, 1 Marsh. 198; Davidson v. Givens, 2 Bibb, 200; Mount v. Waile, 7 Johns. 434; Lansing v. Lansing, 8 Johns. 454; Smith v. McCmasters, 2 P. A. Browne, 182; McAllister v. Gallaher, 3 Penns. 468; App v. Correll, 3 Penns. 494; Lloyd v. Leisenring, 7 Watts, 294; Wagonseller v. Snyder, 7 Watts, 343; Mytinger v. Springer, 3 Watts & S. 405; McKern v. Caherty, 1 Hall, 300; Rust v. Gott, 9 Cowen, 169; Brush v. Keeler, 5 Wend. 250; Hoit v. Hodge, 6 N. H. Rep. 104; Evans v. Jones, 5 Mees. & W. 77.g

With respect to wagers, a wager on the life of Napoleon Bonaparte has been held illegal, on the ground of immorality, and as being against public policy.

Gilbert v. Sykes, 16 East, R. 150.

β A wager whether or not Napoleon Bonaparte would, within a specified time, be removed or escape from the island of St. Helena, was held to be illegal and void.

Phillips v. Ives, 1 Rawle, 36, 42.g

So also a wager that plaintiff would not marry within six years, as being in restraint of marriage.

Hartley v. Rice, 10 East, R. 28.

So it seems is a wager that a certain individual shall go by one of two public conveyances, as tending to the inconvenience and annoyance of the



## (A) How far restrained by the Common Law

party; at all events, if the deposit be demanded back before the wager is decided, an action may be maintained for it.

*Eltham v. Kingsman*, 1 Barn. & A. 683. It was long since held, that the courts would not try an action on a wager, on an abstract question of law or judicial practice not arising out of any existing circumstances in which the parties had a legal interest. *Henkin v. Guerss*, 12 East, 247. And Lord Loughborough refused to try a wager as to the mode of playing hazard, a *prohibited game*; and his decision was confirmed by the court. *Brown v. Leeson*, 2 H. Black. 43. And Lord Ellenborough refused to try a wager on a cock-fight, on account of the barbarity of the sport. *Squires v. Whisken*, 3 Camp. 140. And Gibbs, C. J., did the same as to a wager whether an unmarried woman had had a bastard, saying, when he heard she was *unmarried* he resolved not to try the case. *Ditchburn v. Goldsmith*, 4 Camp. 152. These judges acted on something illegal, or *contra bonos mores*, in the subject of the wager which was to be discussed; and in all the above cases the action was brought to *try the wager*, not to recover back a deposit: but where the wager is not illegal or immoral, some judges have considered themselves bound to try it. Thus Lord Kenyon in *Bulley v. Frost* held, that an action might be maintained to recover a sum won at the game of all-fours. 1 Esp. Ca. 236. And Mr. J. Lawrence, in 1810, tried an action for a wager on a horserace, being "of opinion that the bet being under 10*l.*, and therefore not contrary to 9 Ann. c. 14, and the race being for upwards of 50*l.*, and therefore not contrary to 13 G. 2, c. 19, the action well lay." *M'Allester v. Haden*, 2 Camp. 438. But a bet above 10*l.* is not legal, though the horserace be legal, and a bill given for such bet cannot be enforced even by an endorsee for value. *Shillito v. Theed*, 7 Bing. 405. Sir James Mansfield, C. J., tried an action on a wager of a rump and dozen on a party's age. *Hussey v. Crickett*, 3 Camp. 168. But Ld. Tenterden, C. J., has expressed "that it is his practice never to try *such* causes." 1 Moo. & Malk. 226, *notá*; by which he seems to have meant causes in any way relating to a wager, as actions for deposits, and not merely causes involving the *decision* of the wager. And Bayley, J., concurred. *Ibid.* And in *Kennedy v. Gad*, Moo. & Malk. Ca. 225, Lord Tenterden refused to try an action to recover a deposit from the stakeholder on a bet on a wrestling match, the match having gone off, and discharged the jury. But that a deposit on a wager, *though illegal*, is legally recoverable if the event has not happened, or if the depositor give notice to the stakeholder not to pay the deposit over, see *Hastelow v. Jackson*, 8 Barn. & C. 221. And it may be doubted whether judges are authorized to refuse to try any wagers which can legally be made the subject of action, on the mere ground of their frivolity and the hindrance to other causes. In *Bate v. Cartwright*, 7 Price, 540, where the judge had nonsuited the plaintiff in an action to recover a deposit from the stakeholder on a wager on a foot-race, on the ground that the action was frivolous, and a hindrance to other business, the court set aside the nonsuit, holding that the action well lay. And see tit. *Assumpsit* (E).

In an action by the endorsee against the drawer of a bill, the drawer cannot set up that the bill was drawn and accepted for a gaming debt due from the acceptor; for this does not vitiate the bill as between the drawer and an endorsee for value, though the stat. 9 Ann. c. 14, says, that securities given for gaming debts "*shall be void to all intents and purposes whatsoever.*"

*Edward v. Dick*, 4 Barn. & Ald. 212.

The assignees of a bankrupt may recover back on the statute money lost by the bankrupt at play.

*Carter v. Abbott*, 1 Barn. & C. 444; and see 2 Ves. jun. 514.

Where the plaintiff, in an action on the statute 9 Ann. c. 14, recovered treble the value of the money lost at play, the loser not having sued in the prescribed time, and a writ of error was brought by defendant, and judgment affirmed without costs, it was held that the poor of the parish where the offence was committed were entitled under the statute to one moiety of the sum recovered, without deducting costs.

*Willan v. Taylor*, 7 Barn. & C. 111.

Keeping a common gaming-house, and for lucre or gain unlawfully causing and procuring idle and evil-disposed persons to frequent and come

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to play there together at a game called *rouge et noir*, and permitting the said idle and evil-disposed persons to remain playing at the same game for divers large and excessive sums of money, is an indictable offence at common law.

Rex v. Rogier and Humphry, 1 Barn. & C. 272; and see Rex v. Taylor, 3 Ib. 502.¶

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THERE have been several statutes made for the restraining of gaming, such as the 33 H. 8, c. 9; 2 & 3 Ph. & Ma. c. 9; 16 Car. 2, c. 7; 9 Ann. c. 14, and 2 Geo. 2, c. 28, which reciting the 33 H. 8, and that no power is given unto justices of the peace to demand and take from persons found playing contrary to law, any other security than their own recognisances, &c., enacts, "That where it shall be proved upon the oath of two or more creditable witnesses, before any justice or justices of the peace, as well as where such justice or justices shall find, upon his or their own view, that any person or persons have or hath used or exercised any unlawful game, contrary to the said statute, the said justice or justices shall have full power and authority to commit all and every such offender or offenders to prison, without bail or mainprize, unless and until such offender and offenders shall enter into one or more recognisance or recognisances, with sureties or without, at the discretion of the said justice or justices of the peace, that he or they respectively shall not from thenceforth play at or use such unlawful game."

Of gaming by persons becoming bankrupts, vide tit. *Bankrupts*. ¶ The first statute which prohibited any sort of games and diversions, was the 12 R. 2, c. 6, repealed by 21 Ja. 1, c. 28. It applied only to servants, labourers, and artificers. The games prohibited were tennis or foot-ball, quoits, dice, casting of the stone kails, and other such *importune games*.¶

But the most remarkable statutes to this purpose are the 16 Car. 2, c. 7, and the 9 Ann. c. 14.

By the first of which it is enacted, "That if any person or persons of any degree or quality whatsoever, at any time or times, do or shall by any *fraud, shift, cosenage, circumvention, deceit, or unlawful device, or ill practice* whatsoever, in playing at or with cards, dice, tables, tennis, bowls, kittles, shovel-board; or in or by cock-fighting, horseraces, dog-matches, or foot-races, or other pastimes, game or games whatsoever, or in or by bearing a share or part in the stakes, wagers, adventures, or in or by betting on the sides or hands of such as do or shall play, act, ride, or run as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever; that then every person and persons so offending as aforesaid, shall *ipso facto* forfeit and lose treble the sum or value of money, or other thing or things so won, gained, obtained, or acquired; the one moiety thereof to our sovereign lord the king, his heirs and successors, and the other moiety thereof unto the person or persons grieved, or who shall lose the money or other thing or things so gained; so as every such loser and person grieved in that behalf do or shall prosecute and sue for the same within six calendar months next after such play; and in default of such prosecution, the same other moiety to such person or persons as shall or will prosecute or sue for the same, within one year next after the said six months expired; and that the said forfeitures shall and may be sued for or recovered by action of debt, bill, plaint, or information, in any of his majesty's courts at Westminster, wherein no essoin, protection, or wager of law shall be allowed; and that all and

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every such plaintiff or plaintiffs, informer or informers, shall, in every such suit and prosecution, have and recover his and their *treble* costs against the person offending and forfeiting as aforesaid."

And by § 3, of the said statute it is further enacted, "That if any person or persons shall at any time play at any of the said games, or any other pastime, game or games whatsoever, (other than with and for ready money,) or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, or other thing or things so played for, *exceeding the sum of one hundred pounds*, at any one time or meeting, upon ticket or credit, or otherways, and shall not pay down the same at the time when he or they shall so lose the same; the party and parties who loseth or shall lose the said moneys, or other thing or things so played, or to be played for, *above the said sum of one hundred pounds*, shall not in that case be bound or compelled, or compellable, to pay or make good the same, but the contract(a) or contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognisances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, which shall be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for the same, or any part thereof, shall be utterly void and of none effect; and that the said person or persons so winning the said moneys or other things, shall forfeit and lose treble the value of all such sum and sums of money, or other thing or things, which he shall so win, gain, obtain, or acquire, above the said sum of one hundred pounds; the one moiety thereof to our said sovereign lord the king, his heirs and successors; and the other moiety thereof to such person or persons as shall prosecute or sue for the same within one year next after the time of such offence committed, and to be sued for by action of debt, bill, plaint, or information, in any of his majesty's courts of record at Westminster, wherein no essoin, protection, or wager of law shall be allowed; and that every such plaintiff or plaintiffs, informer or informers, shall in every such suit or prosecution have and receive his treble costs against the person or persons offending and forfeiting, as aforesaid."

(a) [The words "contract or contracts for the same" are not in 9 Ann. c. 14, and were probably left out designedly. 2 Bur. Rep. 1081.]

In the construction of this statute the following opinions have been holden:

1. That if the loser draws a bill for 120 guineas on his banker, who accepts the bill, to an action brought against him by the winner, the drawee may well plead this statute, although it was objected, that the nature of the duty was altered, and a new contract created by the acceptance, and that it would endanger the credit of such bills, if they could be avoided on this account. But these reasons did not prevail; for though it be in the nature of a new contract, yet all is founded on the illegal and tortuous winning, to which the plaintiff is privy.

Hussey v. Jacob, Salk. 344; Carth. 356; and 5 Mod. 175, S. C., adjudged; Holt, 328; Comyns, 4; 12 Mod. 96.

2. But it seems, that if the winner had assigned this bill or note *bonâ fide*, upon good consideration, to a stranger, he had not been within the statute, not being privy to the tort, but an honest creditor.

Salk. 345; Carth. 357. [But see Bowyer v. Brampton, 2 Str. 1155; Lowe v. Waller, Dougl. 736; {8 Term, 392, 393, Cuthbert v. Haley.}]

3. Also it hath been adjudged, that if a man wins above the sum men-

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tioned in the statute at play, and the winner owes J S the like sum, who demands his money, and thereupon the winner tells him, that such a one, viz., the loser, was indebted to him, and that he would give him his bond for the money, which he accordingly does ; in this case, if J S is not privy to the moneys being won at play, he is not within the statute.

2 Mod. 279.

4. It seems to be the better opinion, that a person's losing 80*l.* at one meeting, for which he gives security, and 70*l.* more at another meeting, to the same person, is not within the statute. But, if these several meetings were appointed to evade the statute, it might be otherwise.

Hill v. Pheasant, 2 Mod. 54 ; 1 Freem. 200, S. C.

5. But it hath been adjudged, that if A and B enter into articles to run a horserace such a day for a 100*l.*, which is won by A, and further in the same articles, that on a subsequent day, A should, at B's request, bring his horse to run against his for 200*l.* more, which B never requests, though only 100*l.* is won by A, which is not above the sum mentioned in the statute, yet the contract being for more than 100*l.* makes the whole bargain void *ab initio*, and within the statute ; which being made to prevent the use of excessive gaming, ought to be construed in the most extensive manner that can be to answer that end.

Edgebury v. Rosindale, adjudged, 2 Lev. 94 ; Vent. 253, S. C., adjudged ; Hudson v. Malin, 1 Freem. 432 ; 3 Keb. 671, S. C.

6. If A wins a watch from B of 10*l.* value, which is presently delivered, and also 100*l.* for which a bond is given ; this is not within the statute, which extends only to those cases where *credit* is given for any sum lost at play *above* 100*l.*, without any regard to what was lost in ready money ; and here the watch is in nature of ready money, and therefore not within the statute.

Danvers v. Thistlethwayte, 1 Lev. 244 ; Sid. 394, S. C. ; Salk. 345, S. C., cited as law by Holt, C. J.

7. It hath been adjudged, that if a person loses 60*l.* to one, and 60*l.* to another, at one sitting, or if he loses to each of three or four people 50*l.*, or any other sum not exceeding 100*l.*, that this is not within the statute.

Stanhope v. Smith, 5 Mod. 351 ; Dickson v. Pawlet, 1 Salk. 345, S. P. adjudged, unless they go shares fraudulently and join in the stakes ; for then, as to the change of the game, they are as one person.

8. If two are at play at backgammon, and one of the players stirs a man, but does not move it from the point, upon which there ensues a wager of 100 guineas, viz. whether he who stirred the man was obliged to play it, and the determination was left to the groom-porter, who determines that he was not ; this is not within the statute, for the money was not lost on the chance of the play, but on the right of the play, which is a collateral matter.

Pope v. St. Leger, 1 Salk. 344 ; 4 Mod. 409 ; 10 Mod. 336 ; 12 Mod. 81 ; 5 Mod. 1 ; Skin. 572 ; Lutw. 487 ; Carth. 322, S. C. ; but note, the judgment in this case was reversed for a fault in the pleading. Vide Brown v. Leeson, 2 H. Bl. 43. But *qu.* the law of that case.

By the 9 Ann. c. 14, it is enacted, "That all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole, or any part of the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other

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game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; and that where such mortgages, securities, or other conveyances shall be of lands, tenements, hereditaments, or shall be such as encumber or affect the same, such mortgages, securities, or other conveyances, shall enure, and be to and for the sole use and benefit of, and shall devolve upon such person or persons as should or might have, or be entitled to such lands, tenements, or hereditaments, in case the said grantor or grantors thereof, or the person or persons so encumbering the same, had been naturally dead, and as if such mortgages, securities, or other conveyances had been made to such person or persons so encumbering the same; and that all grants or conveyances to be made for the preventing of such lands, tenements, or hereditaments from coming to, or devolving upon such person or persons hereby intended to enjoy the same, as aforesaid, shall be deemed fraudulent and void, and of none effect to all intents and purposes whatsoever."

By 12 G. 2, c. 28, § 2, the game of ace of hearts, faro, basset, and hazard, are declared to be games or lotteries by cards or dice; and every person who shall set up, maintain, or keep these games, shall be liable to all the penalties for setting or keeping any of the games or lotteries in this act mentioned. By 13 G. 2, c. 19, § 9, the game of passage, and every other game with one or more die or dice, or with any other instrument, engine, or device, in the nature of dice, having one or more figures or numbers thereon, (backgammon and the other games now played with the backgammon-tables only excepted,) shall be deemed games or lotteries by dice within the last act. By 18 Geo. 2, c. 34, no person shall keep any house, room, or place for playing, or suffer any person whatsoever within any such house, room, or place, to play at the game of rowlet, otherwise roly-poly, or at any other game with cards or dice prohibited by law, and the offender shall incur the penalties, and be liable to such prosecution as directed by this act. By § 5, no person incapable of being a witness (except the parties) for having played, betted, &c. By § 7, no privilege of parliament to be allowed in prosecutions, &c. By 30 G. 2, c. 24, § 14, if any publican permits journeymen, &c., to game in his house, he shall forfeit 40s., and ten pounds for every subsequent offence, to be levied by distress and sale. *BA* bet whether a race already passed had been won by a particular horse, held not to be illegal within 9 Ann. c. 14; *Pugh v. Jenkins*, 1 Gal. & D. 40.*g*

§ 2. "And it is further enacted, That any person who shall at any time or sitting, (*a*) by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting in the whole the sum or value of ten pounds, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying, or delivering the same, shall be at liberty, within three months (*b*) then next, to sue for and recover the money or goods so lost, and paid or delivered, or any part thereof, from the respective winner and winners thereof, with costs of suits, by action of debt founded on this act, to be prosecuted in any of her majesty's courts of record, in which action or suits, no essoin, protection, wager of law, privilege of parliament, or more than one imparlance shall be allowed; in which action it shall be sufficient for the plaintiff to allege, that the defendant or defendants are indebted to the plaintiff, or received to the plaintiff's use, the moneys so lost or paid, or converted the goods won of the plaintiffs to the defendant's use, whereby the plaintiff's action accrued to him, according to the form of this statute, without setting

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forth the special matter ; and in case the person or persons, who shall use such money or other thing as aforesaid, shall not within the time aforesaid, really and *bonâ fide*, and without covin or collusion, sue, and with effect prosecute for the money or other thing, so by him or them lost, and paid or delivered, as aforesaid, it shall and may be lawful to and for any person or persons, by any such action or suit, as aforesaid, to sue for and recover the same, and treble the value thereof, with costs of suit, against such winner or winners as aforesaid ; the one moiety thereof to the use of the person or persons that will sue for the same, and the other moiety to the use of the poor of the parish where the offence shall be committed."

(a) [To lose 10l. at one time is to lose it by a single stake or bet ; to lose at one sitting, is to lose it in a course of play where the company never parts, though the person may not be actually gaming the whole time. *Per Blackstone J.* ; 2 Bl. Rep. 1227.] (b) || In trover for a mare lost on a gaming contract, (the action being commenced after three months) it was ruled, that the plaintiff was not entitled to recover on account of the general invalidity of the contract. And by Heath J. There is no substantive clause in the act, which avoids the contract ; it only renders it liable to be defeated *sub modo*, for which purpose the plaintiff must bring his action in a limited time. *Vaughan v. Whitcomb*, 2 N. R. 413 ; Ev. St. pt. iii. ch. vii. note 11. And money fairly lost at play cannot be recovered back as paid without consideration, in an action for money had and received, the declaration not concluding *contra formam statuti*. *Thistlewood v. Cracroft*, 1 M. & S. 500. If a conviction be made after the expiration of the three months, it will be bad, though the magistrate adjourn over that time at the defendant's request. *R. v. Tolley*, 3 East, 467. ||

§ 3. "And for the better discovery of the moneys, or other thing so won and to be sued for and recovered as aforesaid, it is further enacted, That all and every the person or persons who, by virtue of this present act, shall or may be liable to be sued for the same, shall be obliged and compellable to answer upon oath such bill or bills as shall be preferred against him or them, for discovering the sum and sums of money, or other thing so won at play, as aforesaid."

β In a suit for the discovery whether the security on which an action at law was brought ; was not for money lent at play ; held that the forfeiture of the security under 9 Ann. c. 4, was a penalty such as to protect the party from answering. *Sloman v. Kelly*, 1 Yo. & C. 169. g

§ 4. "Provided, that upon the discovery and repayment of the money, or other thing so to be discovered and repaid as aforesaid, the person or persons, who shall so discover and repay the same as aforesaid, shall be acquitted, indemnified, and discharged from any further or other punishment, forfeiture, or penalty, which he or they may have incurred by the playing for, or winning such money or other thing so discovered and repaid as aforesaid."

§ 5. "And it is further enacted, That if any person do or shall, by any fraud or shift, cosenage, circumvention, deceit, or unlawful device or ill practice whatsoever, in playing at or with cards, dice, or any the games aforesaid, or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever, or shall at any one time or sitting win of any one or more person or persons whatsoever, above the sum or value of ten pounds ; that then every person or persons so winning by such ill practice as aforesaid, or winning at any one time or sitting above the said sum or value of ten pounds, and being convicted of any of the said offences, upon an indictment or information to be exhibited against him or them for that purpose, shall for-

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feit five times the value of the sum or sums of money, or other things so won as aforesaid; and in case of such ill practice as aforesaid, shall be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury; such penalty to be recovered by such person or persons as shall sue for the same by such action as aforesaid."

§ 6. "And whereas divers lewd and dissolute persons live at great expenses, having no visible estate, profession, or calling to maintain themselves, but support those expenses by gaming only; it is further enacted, That it shall and may be lawful for any two of her majesty's justices of the peace in any county, city, or liberty whatsoever, to cause to come, or to be brought before them, every such person or persons within their respective limits, whom they shall have just cause to suspect to have no visible estate, profession, or calling to maintain themselves by, but do for the most part support themselves by gaming; and if such person or persons shall not make it appear to such justices, that the principal part of his or their expenses is not maintained by gaming, that then such justices shall require of him or them sufficient sureties for his or their good behaviour for the space of twelve months, and in default of his or their finding such securities, to commit him or them to the common jail, there to remain until he or they shall find such sureties as aforesaid."

§ 7. "And it is further enacted, That if such person or persons so finding sureties shall, during the time for which he or they shall be so bound to the good behaviour, at any one time or sitting, play or bet for any sum or sums of money, or other thing exceeding in the whole the sum or value of twenty shillings, and that then such playing shall be deemed or taken to be a breach of his or their behaviour, and a forfeiture of the recognisance given for the same."

§ 8. "And for the preventing of such quarrels as shall or may happen on the account of gaming, it is further enacted, That in case any person or persons whatsoever shall assault and beat, or shall challenge or provoke to fight any other person or persons whatsoever (a), upon account of any money won by gaming, playing, or betting at any of the games aforesaid, such person or persons assaulting and beating, or challenging or provoking to fight, such other person or persons, upon the account aforesaid, shall, being thereof convicted upon an indictment or information to be exhibited against him or them for that purpose, forfeit to her majesty, her heirs and successors, all his goods, chattels, and personal estate whatsoever, and shall also suffer imprisonment without bail or mainprize, in the common jail of the county where such conviction shall be had, during the term of two years."

(a) || In *R. v. Randal*, 1 East, P. C. 423, Buller, J., expressed an opinion, that judgment could not be given on this clause, unless the assault was committed at the time of play. But in *R. v. Darley*, 4 East, 174, it was holden, that if the jury find that the assault was *on account* of money won at play, the case is within the statute, although the assault was committed at a subsequent time, and at a different place, and after abusive language between the parties in respect of the money won; and judgment was given accordingly.||

§ 9. "Provided, That nothing in this act shall extend to prevent or hinder any person or persons from gaming or playing at any of the games aforesaid, within any of her majesty's palaces of St. James or Whitehall, during such time as her majesty, her heirs or successors, shall be actually resident at either of the said two palaces, or in any other royal palaces where her majesty, her heirs or successors, shall be actually

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resident, during the time of such actual residence, so as such playing be not in any house, lodging, or other part of any of the said palaces, the freehold or inheritance whereof is or shall be out of the crown, or is or shall be in lease to any person or persons, during such time as such freehold and inheritance shall be out of the crown, or such lease shall continue, and so as such playing be for ready money only."

[Upon this act it hath been determined, that although both the security and the contract are void as to money won at play, only the security is void as to money lent at play; and that the contract as to that remains, and the lender may maintain an action for it.

Barjeau v. Walmsley, 2 Str. 1249; Aleinbrook v. Hall, 2 Wils. 309; Robinson v. Bland, 2 Burr. 1077; Phillips v. Cockayne, 3 Campb. 120.

|| But, where the plaintiff had by the defendant's authority laid illegal bets in the defendant's name, and losing, had paid them without a subsequent express direction so to do, he was not allowed to recover from the defendant the amount of the money so paid.

Clayton v. Dilly, 4 Taunt. 165.||

A bill of exchange given for money won at play, cannot be recovered upon by an endorsee for valuable consideration, and without notice, the original vice of the consideration affecting the security even in the hands of an innocent and *bonâ fide* holder.

Bowyer v. Bampton, 2 Str. 1155; Peacocke v. Rhodes, Dougl. 614; Lowe v. Waller, Ibid. 716.

|| Where a young man had given bills for the amount of a gaming debt, and when they were due, had renewed them with the then holder, and for the last bills had confessed a judgment; the court of C. B. refused to set aside the judgment, unless he could affect the holder of the bills with notice, but permitted him to try that fact in an issue.

George v. Stanley, 4 Taunt. 683.

Where an action by the defendants on a bill of exchange against the plaintiff as an endorser, had failed, on the defence that it had been accepted for a gambling debt; and the plaintiff afterwards, in consideration of their giving up that bill, gave them a new bill for the same sum and interest, which they put in suit, and had judgment by default; the Court of Exchequer would not grant an injunction to restrain them from taking out execution, because the plaintiff, if this judgment had not been suffered, would have had the same defence at law on this as on the other bill, and therefore he had no equity.

Graves v. Houlditch, 2 Pr. 147.||

If money be paid on a security made void by the statute, it may be recovered back; and the action may be brought after the expiration of three months, the time within which the loser of money actually paid at the time it is lost must bring his action to recover it back; for that limitation doth not extend to payments made on account of such void securities.

Rawden v. Shadwell, Ambl. 269.  $\beta$  Money lost in gaming and paid, cannot be recovered back. Stowell v. Guthrie, 2 Hayw. 297; Hodges v. Pitman, 2 Car. Law Rep. 394;  $\gamma$  Turner v. Warren, 2 Str. 1079.

As the second section of this statute empowers any person to sue for and recover the money; and then directs that a moiety of it shall be to the use of the poor of the parish where the offence shall be committed; therefore, the declaration may be laid either "to render to the informer only," or, "to



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render to the informer and the poor;" and consequently, so may the judgment be likewise.

Frederick v. Lookup, 4 Burr. 2021.

If a defendant be convicted in an information upon that clause of the statute, which says that he shall forfeit five times the value, the court cannot impose a fine upon him; but the only judgment they can give, is, *quod convictus est*; a new action must be brought upon that judgment for the forfeiture.

Rex v. Luckup, 2 Str. 1048.

In an action to recover back money lost at any game within this statute, it must be stated that some one was actually playing at such game, else a wager of above 10*l.* laid upon his side is not a betting within the act.

Lynall v. Longbotham, 2 Wils. 36. It was said in this case, that this statute is penal, and not remedial: but, where the action is, as here, by the party who has lost the money, the statute is remedial, and not penal; || the action is given on the ground of a contract, not by way of penalty; || and therefore a new trial may be had after verdict for the defendant. Bones v. Booth, 2 Bl. Rep. 1226. || He may be holden to bail, Turner v. Warren, 2 Str. 1149, and may plead in abatement that the money is claimable from others not named, as well as from himself. Bristow v. James, 7 T. R. 257. The right to sue is also transmissible to the assignees of a bankrupt. Brandon v. Pate, 2 H. Bl. 308; Brandon v. Sands, 2 Ves. jun. 514. ||

A foot-race, and a horserace, are games within the statute: so it seems is cricket. Indeed, it seems immaterial to consider whether the game itself be lawful or not; if a man loses above 10*l.* by playing or betting at it, it is within the statute.

Lynall v. Longbotham, 2 Wils. 36; Brown v. Berkeley, Cowp. 281; Blaxton v. Pye, 2 Wils. 309; Goodburn v. Marley, 2 Str. 1159; Jeffreys v. Walter, 1 Wils. 220; Clayton v. Jennings, 2 Bl. Rep. 706. β A wager on a horserace is unlawful in New York, M'Keon v. Caherty, 1 Hall, 300; North Carolina, Wood v. Wood, 3 Murph. 458; and South Carolina, Haskett v. Wootan, 1 N. & M. 180.*g*

|| To entitle a party to maintain a bill for a discovery upon this act, it must appear upon the face of the bill, either that he is himself the loser of the money, or, if the three months have elapsed, that he has invested himself with the character of an informer by having commenced a suit at law. He need not state in terms that the action he has commenced is a *qui tam* action; if the right appears upon the bill, the action will be presumed to have been regularly instituted.

Mynd v. Francis, Anstr. 5; Hudson v. Davis, Ibid. 504; Cowan v. Phillips, in Seac. II. 37 G. 3.

The party is entitled to a discovery against securities given for the money lost, as well as for the money only.

Newman v. Franco, Anstr. 519; Andrews v. Berry, Ibid. 634. ||

The statute of 27 Geo. 3, c. 1, which takes away the summary jurisdiction of magistrates over the lotteries, extends only to state lotteries; and does not repeal their power over the games of chance or lotteries prohibited by stat. 12 Geo. 2, c. 28.

Rex v. Liston, 5 T. R. 338.

In 13 Geo. 2, c. 19, enacts that no plate under the value of 50*l.* shall be run for, or be advertised or proclaimed to be run for, by any horse, &c., under a penalty of 200*l.*, and that no person shall run any match between any horse, &c., for any sum of money, plate, prize, or other thing whatsoever, unless such match shall be started or run at Newmarket

(B) How far restrained by Statute.

or Black Hambleton, or such sum of money, &c., be of the real and intrinsic value of 50*l.* or upwards.

Upon this act it hath been determined, that a match for 25*l.* each side, play or pay, the plaintiff to pay the defendant 5*l.* before-hand, is a match for 50*l.*

Bidmead v. Gale, 4 Burr. 2432; 1 Bl. Rep. 671, S. C.

The statute having prohibited any horserace for a smaller stake than 50*l.*, of course, no action can be maintained to recover a wager on such a race.

Johnson v. Bann, 4 T. R. 1.]

|| And even where the sum run for is above 50*l.*, a wager on the race is illegal, unless it be a *bonâ fide* contest between two or more horses running on the turf.

Ximenes v. Jaques, 6 T. R. 499; Whaley v. Pajot, 2 Bos. & Pull. 51.

But, where the sum run for is 50*l.*, or upwards, and the sum staked by each of the parties is under 10*l.*, an action may be maintained on the wager.

M'Allester v. Haden, 2 Campb. 438. See the judicious observations of Mr. Evans upon these decisions, in the notes to his edition of the statutes, pt. iii. ch. vii.

An action has been maintained for the sum of 3*l.* 10*s.* lost by the defendant to the plaintiff at the game of *all-fours*.

Bulling v. Frost, 1 Esp. Cas. 236, *coram* Kenyon, C. J.

Money *fairly* lost at play cannot be recovered back in an action of debt for money had and received, not founded on the statute.

Thistlewood v. Cracroft, 1 Maule & S. 500.

The statute of 9 Ann. c. 14, which avoids all securities for goods or money lost at unlawful games, and gives the loser a power of recovering back the same within three months, does not render the contract void, but only voidable, and the loser cannot recover them after the three months.

Vaughan v. Whitecomb, 2 New R. 413.

In an action against the drawer of a bill, it is no defence that the bill was accepted for a gaming debt, if it be endorsed over by the drawer for a valuable consideration to the plaintiff.

Edwards v. Dick, 4 Barn. & A. 212.

The court will not set aside a judgment on the ground that the warrant of attorney grounding it was given to secure a gaming debt, if it appear that the party making the application represented to the plaintiff before he purchased the debt that it was a valid debt.

Davison v. Franklin, 1 Barn. & Adol. 142.

By 3 G. 4, c. 114, persons convicted of keeping a gaming-house may be sentenced to imprisonment with hard labour.||

## GAOL AND GAOLER.

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- (A) Jails, by what Authority erected, and to whom they belong.
  - (B) Who are to be at the Charge of repairing them.
  - (C) To what Place Offenders are to be committed: And herein what shall be said a Jail, and where to be kept.
  - (D) Of the Duty and Power of Jailers and Keepers of Prisons: And herein,
    1. *What Acts they may lawfully do, and for what Abuses they are punishable.*
    2. *For what Offences they shall forfeit their Offices.*
  - (E) At whose Charge prisoners are to be carried to Jail.
  - (F) How maintained there.
  - (G) Of the Offence of breaking Jail.
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(A) Jails, by what Authority erected, and to whom they belong.

JAILS are of such universal concern to the (a) public, that none can be erected by any less authority than by act of parliament.

2 Inst. 705. (a) Hence the coroner is to inquire of the death of all persons whatsoever who die in prison, to the end that the public may be satisfied whether such persons came to their end by the common course of nature, or by some unlawful violence, or unreasonable hardships put on them by those under whose power they were confined. 3 Inst. 52, 91.

Also, all prisons or jails belong to the king, although a subject may have the (b) custody or keeping of them.

2 Inst. 100. (b) Where a person may be judge and jailer, as the sheriff of London is of the Compter, both judge and keeper. Roll. Abr. 806; Show. Rep. 162, cited.

And to this purpose by the 5 H. 4, c. 10, reciting, "That divers constables of castles within the realm, being assigned justices of peace by the king's commission, had by colour of such commission taken people to whom they bore evil will, and imprisoned them within the said castles till they had made fine and ransom with the said constables for their deliverance; it is ordained, that none be imprisoned by any justice of the peace, but only in the common jail; saving to lords and others, which have jails, their franchise in this case."

And it hath been holden, that the king's grant, since this statute, to private persons to have the custody of prisoners committed by justices of peace, is void; and that the sheriff shall have the custody of all persons taken by virtue of any precept or authority to him directed, notwithstanding any grant by the king of the custody of prisoners to another person.

And. 345; 4 Co. 34 a; 9 Co. 119; Cro. Eliz. 829.

Also it is said, that none can claim a prison as a franchise, unless they have also a jail-delivery; and that therefore the dean and chapter of Westminster, though they have the custody of the Gate-house prison; yet, as they have no jail-delivery, they must send a calendar of the prisoners to Newgate.

Salk. 343; Faresl. 31, *per* Holt, C. J.

By the 14 E. 3, st. 1, c. 10, "In the right of the jails, which were wont

(B) Who are to be at the Charge of repairing them.

to be in ward of the sheriffs, and annexed to their bailiwicks, it is assented and accorded, that they shall be rejoined to the sheriffs; and the sheriffs shall have the custody of the same jails as before this time they were wont to have, and they shall put in such keepers for whom they will answer."\*

This statute confirmed by 19 H. 7, c. 10, and 5 Ann. c. 9. \*And by 11 & 12 W. 3, c. 19, § 3. The sheriffs shall have the custody of jails.—As to the King's Bench prison and the Fleet, see *infra*.

By the 3 Geo. 1, c. 15, "None shall purchase the office of jailer, or any other office pertaining to the high sheriff, under pain of 500*l*."

β Two resolutions have been enacted by Congress in relation to the prisons for the use of the United States. They are as follows :

1. The first, passed Sept. 23, 1789, by which it is Resolved, "That it be recommended to the legislatures of these several states to pass laws, making it expressly the duty of the keepers of their jails, to receive, and safe keep therein, all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, under the like penalties as in the case of prisoners committed under the authority of such states, respectively; the United States to pay for the use and keeping of such jails, at the rate of fifty cents per month, for each prisoner that shall, under their authority, be committed thereto, during the time such prisoners shall be therein confined; and also to support such of said prisoners as shall be committed for offences."

2. The second, passed March 3, 1821, it is thereby Resolved, "That where any state or states, having complied with the recommendation of Congress, in the resolution of the twenty-third day of September, one thousand seven hundred and eighty-nine, shall have withdrawn, or shall hereafter withdraw, either in whole or in part, the use of their jails for prisoners committed under the authority of the United States, the marshal in such state or states, under the direction of the judge of the district, shall be, and hereby is, authorized and required to hire a convenient place to serve as a temporary jail, and to make the necessary provision for the safe-keeping of prisoners committed under the authority of the United States, until permanent provision shall be made by law for that purpose; and the said marshal shall be allowed his reasonable expenses, incurred for the above purposes, to be paid out of the treasury of the United States."g

(B) Who are to be at the Charge of repairing them.

ALTHOUGH divers lords of liberties have the custody of prisons, and some in fee, yet the prison itself is the king's *pro bono publico*, and therefore it is to be repaired at the common charge.(a)

2 Inst. 589. (a) [In a report which was made by the Attorney and Solicitor General, De Grey and Willes, and submitted to the king, 21 Jan. 1767, upon a question which was at that time agitated between the Bishop of Ely, as lord of the franchise of Ely, on the one part, and the inhabitants of the franchise on the other, touching the repairs of the jail, the editor meets with the following passage: "Although all jails, whether in counties at large or in particular franchises, are deemed to belong to the crown, as far as the public administration of justice is concerned, and it is but the custody of them that is placed in the hands of sheriffs or the lords of franchises, yet we are not able, in a matter which lies buried in much obscurity, and has scarcely ever been called into public discussion in modern times, to find upon what authority a great writer in our law, has inferred from the position 'that all prisons belong to the crown,' 'they are therefore to be repaired at the common charge.' Nor does it appear by whom, and from what persons, and in what manner the charge could have been raised. It seems to us more probable, that from the time that the public jails were rejoined to the counties, and committed to the sole custody of the sheriffs, the charge of keeping and pre-

(B) Who are to be at the Charge of repairing them.

serving them in a proper condition lay in the first instance on the sheriffs, and it is probable that the sheriffs might have an allowance for extraordinary expenses of that sort in their accounts in the exchequer: and we observe, that in the statute of 23 H. 8, for building new jails in several counties particularly mentioned, at the charge of the respective counties, provision is made that sheriffs shall be allowed what they shall expend in the future necessary reparations of such new-built jails in their accounts in the Exchequer. In the same manner, it should seem, that lords of franchises who have the custody of public jails in their respective jurisdictions committed to them, and are thereby responsible to the public for their prisoners, should be bound to provide secure and sufficient jails as incidental to their public trust; and they having no accounts with the Exchequer, can have no such allowance made to them, but may well be supposed to submit to such charge in consideration of the honourable exception of their franchise."—In this case it was the opinion of the above great law officers, that the *onus* of repairing the jail at Ely lay upon the see of Ely, and not upon the inhabitants; an opinion which they grounded, not upon the general law of the question, but upon evidence laid before them of such a charge upon the lords of the franchise being coeval with the franchise. In consequence of this opinion orders were given by the Lords of the Treasury to the Attorney-General to proceed at the expense of the crown against the Bishop of Ely, in order to have the point solemnly settled; but Dr. Mawson, who then filled that see, was so well satisfied with the report, that he readily submitted without any farther litigation, and gave immediate orders for the repair of the jail, which was accordingly done at his expense. So, *R. v. Earl of Exeter*, 6 T. R. 373.] *β* If a prisoner escape through the insufficiency of the jail, the county will be liable to the plaintiff for his damages. *Staphorse v. New Haven*, 1 Root, 126, 155, 278, 337, 450, 505.*g*

But this matter is now regulated by the (a) 11 & 12 W. 3, c. 19, by which it is enacted, "That it shall and may be lawful for the justices of the peace, or the greater number of them, within the limits of their commissions, upon presentment of the grand jury or grand juries, at the assize, great sessions, and general jail-delivery held for the said county, of the insufficiency or inconvenience of their jail or prison, to conclude and agree upon such sum or sums of money, as upon examination of able and sufficient workmen shall be thought necessary for the building, finishing or repairing a public jail or jails belonging to the shire or county whereof they are justices of the peace; and by warrant under their hands and seals, or under the hands and seals of the greater number of them, by equal proportion, to distribute and charge the sum or sums of money, to be levied for the uses as aforesaid, upon the several hundreds, lathes, wapentakes, rape, ward, or other divisions of the said county; and the justices of the peace are hereby authorized and empowered at the general quarter sessions held for the respective division of the said county, to direct their warrants or precepts to high constables, petty constables, bailiffs, or other officer or officers, as they in their discretion shall think most convenient for levying and collecting the same."

(a) Revived and continued for several years by 10 Ann. c. 14, and made perpetual by 6 Geo. c. 19. [Explained and amended by 24 G. 3, sess. 2, c. 54.]

And it is further enacted by the said statute, "That if any person shall refuse or neglect to pay his or their assessment, by the space of four days after demand thereof by the proper officer appointed to collect the same, or shall convey away his or their goods or estate, whereby the sum or sums of money so assessed cannot be levied, then it shall and may be lawful to and for the said collectors, by warrants from any one of the justices of the peace present at the said general quarter sessions as aforesaid, to levy the sum so assessed by distress and sale of the goods and chattels of such persons so refusing or neglecting to pay; and the goods and chattels then and there found, and the distress so taken, to keep by the space of four days at the costs and charges of the owner thereof; and if the said owner do not pay

(B) Who are to be at the Charge of repairing them.

the sum or sums of money so rated or assessed within the space of the said four days, then the said distress to be appraised by two or more of the inhabitants where the same shall be taken, or other sufficient persons, and to be sold by the collector for payment of the said money, and the overplus of such sale, (if any be,) over and above the sum so assessed, and charges of taking and keeping of the distress, to be immediately returned to the owner thereof; and the said justices of the peace are hereby authorized and empowered, under their hands and seals, or under the hands and seals of the greater number of them, to constitute and appoint one or more sufficient person or persons to be receiver of the money so assessed; the said receiver first giving security to be accountable, when thereunto required, for all sums of money received or disbursed by him, in pursuance of such order as he shall have received under the hands and seals of the justices of the peace, or the greater number of them; and if the said receiver or receivers, high constable, petty constable, or other officers, shall by the space of four days after demand refuse to account for all sums of money received by them in pursuance of this act; then it shall and may be lawful for the justices of the peace, or the greater number of them, to commit him or them to prison, there to remain without bail or mainprize, until he or they shall have made a true account, and satisfied or paid such sum or sums of money as shall appear to remain in his or their hands; and the receipt of such receiver shall be a sufficient discharge to all high constables, petty constables, or other officer or officers, paying their proportion of such assessments; and the discharge under the hands and seals of the justices of the peace, or the greater number of them, at the assize, great sessions, and general jail-delivery, to such their receivers, shall be deemed and allowed as a good and sufficient release, acquittance or discharge in any court of law or equity, to all intents and purposes whatsoever; and the said justices of the peace are hereby authorized and empowered to covenant, contract and agree with any person or persons for the well and sufficient building, finishing, and repairing of the said jail or jails.

“Provided that this act be not anywise hurtful or prejudicial to any person or persons having any common jail by inheritance, for term of life or for years; but that they shall have and enjoy the said jails, and the profits, fees, and commodities of the same, as they had, or might lawfully have had before the making of this act, and as if this act never had been made.

“Provided also, that this act shall not extend to charge any person inhabiting in any liberty, city, town, or borough corporate, which have common jails for felons taken in the same, and commissions of assize, or jail-delivery of such felons, for any assessment, to the making the common jail or jails of the respective shire or county.”

And it is further enacted by the said statute, “That where any prisons or jails (belonging to any county of this realm, or the dominions of Wales) are situate upon any lands or hereditaments of or belonging to the king’s majesty, in right of the crown, that the said lands and hereditaments, with their and every of their appurtenances, shall not at any time be alienated from the crown, but remain and be for the public service and benefit of the country.”

|| By stat. 4 G. 4, c. 64, § 45, “In case it shall appear at any time to the justices at any general or quarter sessions of the peace, holden in any county or riding, or in any such division of a county as aforesaid, or in any district, city, town, or place to which this act shall extend, by any report made under the provisions of this act of the state of any prison to such justices at such

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sessions, or by any presentment at any time made by the grand jury at the assizes, great session, session of jail delivery, or session of the peace, to be holden for any such county, riding, division, district, city, town, or place, or by any presentment at any time made by any two or more justices of the peace in and for the same, and laid before the justices at such general or quarter sessions of the peace, that any jail or house of correction, to which this act shall extend, within such county, riding, division, district, city, town, or place, is insufficient, inconvenient, or in want of repair, or otherwise inadequate to give effect to the rules and regulations prescribed by this act, or that there is a necessity for the erection of any new jail or house of correction; the justices assembled at such general or quarter sessions, or at the general or quarter sessions, or adjournment thereof next after any such report or presentment made, shall and they are hereby required to cause notice to be given, three times at least, in some public newspaper circulating within such county, riding, division, district, city, town, or place of such report or presentment having been laid before such sessions, and of their intention to take the same into consideration at the next ensuing or some subsequent, general, or quarter sessions, or adjournment thereof; and in case the justices at such last-mentioned sessions, or the major part of them, shall resolve that such report or presentment is well founded, then it shall and may be lawful for such justices, and they are hereby required at the sessions mentioned in such notice, or at a subsequent sessions or adjournment thereof, with the like notice, to take such measures, either by contract or otherwise, as shall appear to them to be requisite and proper for the altering, enlarging, and repairing, or for building or rebuilding any such jail or house of correction, regard being had, in the case of contracts, to the reasonableness of the price and responsibility of the contractors; and every contractor shall give a sufficient security for the due performance of his contract to the clerk of the peace, or town clerk for the county, riding, division, district, city, town, or place, to be inspected at all reasonable times by any justices, or by any other person contributing to the rate of such county, riding, division, district, city, town, or place, without fee or reward.

"And after such presentment and notice, it shall be lawful for the justices in general and quarter sessions assembled, or the major part of them, and they shall have full power and authority to purchase any houses, buildings, lands, tenements, hereditaments, ways, watercourses, and other easements, for the purpose of enlarging or rendering commodious, or for the building or rebuilding any prison, and to direct the property so purchased to be conveyed to such person or persons as the said justices shall think fit, in trust for the purpose aforesaid, under the regulations and directions in this act contained; and such houses, buildings, lands, tenements, hereditaments, ways, watercourses, or other easements shall, when enclosed and added to such prison, be deemed and taken to be part of such prison, and to be within the county, riding, division, district, city, town, or place, to the use of which such prison may be applied, to all intents and purposes whatsoever, so long as the same shall be used by such county, riding, division, city, district, town, or place for the purpose of this act, and no longer."

§ 47. "If it shall at any time happen, that any such jail or house of correction shall become unsafe or unfit for the custody of the prisoners confined therein, between the several times of holding the general or quarter sessions, it shall and may be lawful for any two or more justices (one of whom shall be a visiting justice for the prison) for the county, riding,

(B) Who are to be at the Charge of repairing them.

division, district, city, town, or place, to order such repairs and alterations to be immediately done and made as may be necessary and sufficient for the safe and proper custody of such prisoners, and the upholding of such prison; and such justices shall report the same to the next court of general or quarter sessions to be holden for such county, riding, division, district, city, town, or place; and such court is hereby authorized to order the payment of such sum or sums of money as shall have been properly expended in such repairs or alterations as aforesaid."

§ 50. "In case it shall be expressly presented that the place wherein any old prison is situated is improper, and that the prison ought to be removed to some other part of the county, riding, division, district, city, town, or place, or that a new jail or house of correction is necessary, the justices in their general or quarter sessions assembled shall take such presentment into their consideration; and if it shall be resolved by the justices assembled at two successive general or quarter sessions, or the major part of them, that such old prison ought to be removed, or that such new prison is necessary, it shall be lawful for the justices so assembled to contract for the building of a new jail or house of correction in any part of the county, riding, division, district, city, town, or place which they may deem most eligible; and whenever the site of any prison shall be changed, and the old site shall be no longer necessary for the purpose of a prison, it shall be lawful for the justices so assembled to make sale thereof (unless it be the property of the king's majesty, his heirs and successors, or of some private individual) for the best price that can be gotten for the same, and to direct the purchase-money to be paid to the treasurer of such county, riding, division, district, city, town, or place, and to direct the trustee of such lands and hereditaments, his heirs, executors, or administrators, (according to the tenure thereof,) and the clerk of the peace, or town-clerk, to convey the inheritance of such site to the purchaser; and every such conveyance, with the treasurer's receipt for the purchase-money, shall give a good and valid title to the purchaser; and the purchase-money shall be applied by the treasurer in aid of the rate of such county, riding, division, district, city, town, or place; whenever the building of any court of justice is or shall be so attached to any prison, so as to render it impracticable or inconvenient to repair, enlarge, improve, or rebuild the said prison without also altering or pulling down the building of the said court, then and in such case it shall be lawful for the justices in general or quarter sessions assembled to cause such courts to be altered or pulled down, or to be rebuilt, either on the same or any other site, subject to the same provisions as are by this act appointed with respect to jails."

By stat. 7 G. 4, c. 18, § 1, after reciting that by 4 G. 4, c. 64, provision is made for the sale in certain cases of the sites of old prisons which are no longer necessary, and that it is expedient to extend the same power to cases not therein provided for, it is enacted, "that in case it shall appear to the justices of the peace who shall be assembled at any general or quarter sessions of the peace to be henceforth holden for any county, riding, or division in England, that by reason of any jail or house of correction for such county, riding, or division having been lately built or considerably enlarged, any other jail or jails, house or houses of correction therein hath or have or shall have become unnecessary, the said justices, or the justices who shall be assembled at the then next general or quarter sessions to be holden for the said county, riding, or division shall order notice to be given



(C) To what place Offenders to be committed.

three times at least in some public newspaper circulating in such county, riding, or division, that the propriety of selling such unnecessary jail or jails, house or houses of correction will be taken into consideration at the next ensuing general or quarter sessions; and in case the justices in such last-mentioned sessions, or the majority of them, shall resolve that such last-mentioned jail or jails, house or houses of correction ought to be sold, then it shall be lawful for such justices, and they are hereby required to take such measures for selling the same, together with all outhouses, land, and appurtenances to the same belonging, (unless they or any part thereof shall be the property of his majesty, his heirs or successors, or of any private individual,) for the best price or prices that can be obtained for the same, either by public auction or private contract, and subject to such conditions and in such manner as they shall think proper.”||

(C) To what Place Offenders are to be committed: And herein, what shall be said a Jail, and where to be kept.

By the 5 H. 4, c. 10, it is enacted, “That none shall be imprisoned by any justice of the peace but only in the common jail, saving to lords and others, who have jails, their franchise in this case.”

2 Inst. 43. That this statute is only declarative of the common law.

But the Court of King’s Bench may commit offenders to any prison in the kingdom which they shall think most proper, and the offenders so committed or condemned to imprisonment cannot be removed or bailed by any other court.

Moor, 666; Sid. 145.

But by the 31 Car. 2, c. 2, § 12, it is enacted, That no subject of this realm, being an inhabitant or resiant of this kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which then were, or at any time hereafter shall be, within or without the dominions of his majesty, his heirs or successors, and that every such imprisonment is by the said statute enacted and adjudged to be illegal; and that every subject so imprisoned shall have an action of false imprisonment, &c., and recover treble costs, and no less damages than five hundred pounds, against the person making such warrant, who shall incur a *præmunire*.

And as prisoners ought to be committed at first to the proper prison, so ought they not to be removed from thence, except in some special cases.

To which purpose, by the 31 Car. 2, c. 2, § 9, it is enacted, “That if any subject of this realm shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers, unless it be by *habeas corpus*, or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer, to carry such prisoner to some common jail; or where any person is sent by order of any judge of assize, or justice of the peace, to any common workhouse, or house of correction; or where the prisoner is removed from one prison or place to another within the same county, in order to his or her trial or discharge in due course of law; or in case of sudden fire (a) or infection, or other necessity;” upon pain that he, who makes out, signs, or countersigns, or obeys

## (D) Of the Duty and Power of Gaolers.

or executes such warrant, shall forfeit to the party grieved one hundred pounds for the first offence, two hundred pounds for the second, &c.

(a) Vide the 19 Car. 2, c. 4, § 2, for empowering justices of the peace to remove prisoners in case of infection.

|| By 11 & 12 W. 3, c. 19, § 3, "All murderers and felons shall be imprisoned in the common jail, and not elsewhere."

By 6 G. 4, c. 19, § 2, "Whereas vagrants and other criminals, offenders, and persons charged with small offences, are for such offences, and for want of sureties, to be committed to the county jail, it being adjudged that by law the justices of the peace cannot commit them to any other prison for safe custody, which by experience hath been found prejudicial and expensive: it is enacted that it shall and may be lawful to and for the justices of the peace within their respective jurisdictions to commit such vagrants and other criminals, offenders, person and persons, either to the common jail, or house of correction, as they in their judgment shall think proper."

A person disobeying an order of bastardy is a criminal offender within the last act, and may be committed to the common jail, or house of correction, as the justices think proper.

R. v. Taylor, 3 Burr. 1679.

By 15 G. 2, c. 24, "Whereas doubts and questions have arisen touching the commitment of offenders by justices of the peace of liberties and corporations to the houses of correction of counties, ridings, or divisions in which such liberties and corporations are situate, though the inhabitants of such liberties and corporations contribute to the maintenance and support of such houses of correction: it is declared and enacted, that in all cases, where any person, liable by law to be committed to the house of correction, shall be apprehended within any liberty, city, or town corporate, whose inhabitants are contributory to the support and maintenance of the house or houses of correction of the county, riding, or division in which such liberty, city, or town corporate is situate; it shall and may be lawful for the justices of the peace of such liberty, city, or town corporate, to commit such person to the house of correction of the county, riding, or division in which such liberty, city, or town corporate is situate; which person so committed shall and may be received, detained, dealt with, and ordered, and be set and kept to hard labour, or conveyed and sent away, or discharged, and be subject and liable to the same correction and punishment, to all intents and purposes, as if committed by any justice or justices of the peace of the same county, riding, or division."||

β It seems that usage may determine the apartments connected with the jail in which the prisoners may be kept in the night, without committing an escape.

Clap v. Cofran, 7 Mass. 98; Freeman v. Davis, 200.g

## (D) Of the Duty and Power of Jailers and Keepers of Prisons: And herein,

1. *What Acts they may lawfully do, and for what Abuses punishable.*

A JAILER is considered as an officer relating to the administration of justice, and is so far under the protection of the law, that if a person threatens him for keeping a prisoner in safe custody, he may be indicted and fined and imprisoned for it.

2 Roll. Abr. 76. βA sheriff is *ex officio* jailer, and liable for the misconduct of his turnkey or servant. Dabney v. Taliafero, 4 Rand. 256.g

## (D) Of the Duty and Power of Gaolers.

If a criminal endeavouring to break the jail assault his jailer, he may be lawfully killed by him in the affray.

Jenk. 23; Hawk. P. C. c. 28, § 13.

But, if a prisoner gets out of jail, and the jailer in pursuit of him kills him, he is guilty of an escape, though he never lost sight of him, and could not otherwise take him; not only because the king loses the benefit he might have had from the attainer of the prisoner by the forfeiture of his goods, &c., but also because the public justice is not so well satisfied by killing him in such an extrajudicial manner.

Fitz. Coron. 328, 346; Staundf. P. C. 33; 2 Hawk. P. C. c. 19, § 6.

Besides the duties enjoined (a) jailers by acts of parliament, and the abuses for which by statute they are punishable, the common law subjects them to fine and imprisonment, as also to the forfeiture of their offices, for gross and palpable abuses in the execution of their offices, such as suffering prisoners to escape, barbarously misusing them, &c.

9 Co. 50; Raym. 216. (a) That a jailer *de facto*, who takes upon him without any legal authority to keep prisoners, as also feme coverts and infants, is answerable for their miscarriages. 2 Inst. 381; 8 Co. 44.

By the 14 E. 3, c. 10, "If it happen that the keeper of the prison, or underkeeper, by too great duress of imprisonment, and by pain, make any prisoner that he hath in his ward to become an appellor against his will, and thereof be attainted, he shall have judgment of life and of member."

In the construction of this statute it is said to be no way material, whether the approvement be true or false, or whether the appellee be acquitted or condemned; but at law this offence was esteemed a misprision only, unless the appellee were hanged by reason of the appeal.

Staundf. P. C. 36; 3 Inst. 91.

Also jailers are punishable by (b) attachment, as all other officers are by the courts to which they more immediately belong, for any gross misbehaviour in their offices, or contempts of the rules of such courts; and punishable by any other courts for disobeying writs of *habeas corpus* awarded by such courts, and not bringing up the prisoner at the day prefixed by such writs.

2 Hawk. P. C. c. 22, § 31; and vide tit. *Habeas Corpus*. (b) But a jailer is not punishable by attachment for the bare escape of a person in his custody by civil process, but the party grieved by such escape ought to take his remedy by action.

By the 4 E. 3, c. 10, reciting, that "whereas in times past, sheriffs, and jailers of jails, would not receive thieves, persons appealed, indicted or found with the manner, taken and attached by the constables and townships, without taking great fines and ransoms of them for the receipt, whereby the said constables and townships have been unwilling to take thieves and felons because of such extreme charges, and the thieves and the felons the more encouraged to offend; it is accorded, that the sheriffs and jailers shall receive, and safely keep in prison from henceforth, such thieves and felons by the delivery of the constables and townships, without (c) taking any thing for the receipt; and the justices assigned to deliver the jail shall have power to hear their complaints, that will complain against the sheriffs and jailers in such case, and moreover to punish the sheriffs and jailers, if they be found guilty."

(c) By 23 H. 8, c. 10, a jailer upon a commitment may take 4*d*.

|| By 55 G. 3, c. 50, it is enacted, "That all fees and gratuities paid or

payable by any prisoner, on the entrance, commitment, or discharge, to or from prison, shall absolutely cease, and the same are hereby abolished and determined."

§ 2. "Whereas in some places such fees and gratuities as aforesaid are payable to the jailer or his servants, and are to him or them as a salary; it is enacted, that it may be lawful for the justices of the peace for any county, city, or town, assembled in general or quarter sessions, to make such allowances to the aforesaid jailer or servants, as may to them seem fit, in the way of salary or compensation for the fees and gratuities payable by prisoners now abolished by this act."

§ 3. "The said justices of the peace for any county, city, or town, may direct the said allowances to be paid out of any county-rate, city-rate, or town-rate, now by law authorized to be made and levied."

§ 13. "Any jailer who shall exact from any prisoner any fee or gratuity for or on account of the entrance, commitment, or discharge of such prisoner, or who shall detain any prisoner in custody for non-payment of any fee or gratuity, shall be deemed incapable of holding his office, be guilty of a misdemeanor, and be punished by fine and imprisonment."

§ 14. "Nothing in this act contained shall be construed to extend to the King's Bench prison, his majesty's prison of the Fleet, the Marshalsea, and Palace Courts."||

By the 3 H. 7, c. 3, it is enacted, "That every sheriff, bailiff of franchise, and every other person having authority or power of keeping of jail, or of prisoners for felony, do certify the names of every such prisoner in their keeping, and of every prisoner to them committed for any such cause, at the next general jail-delivery, in every county or franchise where any such jail or jails have been, or hereafter shall be, there to be calendared before the justices of the deliverance of the same jail, whereby they may, as well for the king as for the party, proceed to make deliverance of such prisoners according to law; upon pain to forfeit to the king for every default there recorded one hundred shillings."

[By 29 G. 3, c. 67, it is enacted, "That at the first session of the peace to be holden after Michaelmas in every year, the jailer, or other officer having the care or superintendence of any jail within the jurisdiction of the court holding such session, shall deliver to the chairman or other magistrate presiding in such court, a certificate according to the form hereunto annexed, subscribed by himself and verified by him, to the best of his knowledge and belief, on his oath, to be taken either before such court, or in case of sickness or inability from any other cause to attend, then before some justice of the peace for the county, town, or district in which such jail shall be situated; and that such certificate shall express, after each of the provisions therein enumerated, whether such provision is or is not complied with or observed within such jail; and such certificate shall be read publicly in open court in the presence of the grand jury, and entered upon record as part of the minutes of the said session."

And by § 2, "The said court of quarter sessions shall thereupon take the said certificate into their consideration, and summon any person or persons named therein to appear before them, and shall give such directions, and make such orders relative to any of the matters contained in such certificate, as to such justices shall seem meet, and shall and may take security from any person or persons whom the same may concern for his or their due compliance therewith."

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By § 3, a jailer neglecting to deliver such certificate forfeits 50*l.* if the jail be a county jail, and 20*l.* if any other jail.

Certificate referred to in the body of this act.

to wit. } At the general quarter sessions of the peace for the  
 } holden at this day of in the  
 year of our Lord the certificate of in pursuance  
 of the statute in this case made and provided, respecting the jail of

22 & 23 C. 2, c. 20, enacts, that

Felons and debtors shall be kept separate, under penalties upon the sheriff or jailer.

24 G. 2, c. 40, enacts, that

1. No jailer shall sell, lend, use, give away, or suffer spirituous liquors within any jail, under a penalty.

2. Copy of the clause last-mentioned, as also of two other clauses respecting the same, shall be hung up in the jail, under a penalty.

32 G. 2, c. 28, enacts, that

The clerk of the peace shall cause a list of the fees payable by debtors, and the rules and orders for the government of jails and prisons, to be hung up in the court where the assizes or sessions shall be held, and send another copy to the jail; and the jailer shall cause the same to be hung up in a conspicuous place in the said jail.

13 G. 3, c. 58, enacts, that

Clergymen may be provided to officiate in jails.

14 G. 3, c. 20, enacts, that

Persons acquitted, or discharged upon proclamation for want of prosecution, shall be discharged immediately in open court, and without fee.

14 G. 3, c. 59, enacts, that

1. The walls and ceilings of cells in jails shall be scraped and white-washed once in the year at least.

2. That the cells shall be kept clean; and

3. That they shall be supplied with fresh air, by ventilators or otherwise.

4. That there shall be two rooms set apart for the sick.

5. That a warm and cold bath, or bathing tubs, shall be provided.

6. That this act shall be hung up in the jail.

7. That a surgeon or apothecary shall be appointed, with a salary.]

By the 22 & 23 Car. 2, c. 20, § 12, it is enacted, "That the several rates of fees, and the future government of prisoners, be signed and confirmed by the lord chief justices, and lord chief baron, or any two of them for the time being; and the justices of the peace in London, Middlesex, and Surrey; and by the judges for the several circuits, and justices of the peace for the time being, in their several precincts, and fairly written and hung up in a table in every jail and prison, and likewise be registered by each and every clerk of the peace within his or their practical juris-

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diction; and after such establishment, no other or greater fee or fees, than shall be so established, shall be demanded or received."

But for the more effectual regulating of the fees of jailers, vide 2 G. 2, c. 22; 3 G. 2, c. 27; 8 G. 2, c. 24; 21 G. 2, c. 33; 32 G. 2, c. 28.

And by the said statute, § 13, it is enacted, "That it shall not be lawful hereafter for any sheriff, jailer, or keeper of any jail or prison to put, keep, or lodge prisoners for debt and felons together in one room or chamber, but that they shall be put, kept, and lodged separate and apart one from another in distinct rooms; upon pain that he, she, or they, which shall offend against this act, or the true intent and meaning thereof, or any part thereof, shall forfeit and lose his or her office, place, or employment, and shall forfeit treble damages to the party grieved, to be recovered by virtue of this act."

## 2. For what Offences they shall forfeit their Offices.

It seems clearly agreed, that a jailer, by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in jail after they have been legally discharged, and paid their just fees, forfeits his office; for that in the grant of every office, it is implied that the grantee execute it faithfully and diligently.

Co. Lit. 233; 9 Co. 5; 3 Mod. 143.

As, where the king granted to the abbot of St. Albans to have a jail, and to have a jail-delivery, and divers persons were committed to that jail for felony; and because the abbot would not be at the cost to make deliverance, he detained them in prison a long time without making lawful deliverance; it was resolved, that the abbot had for that cause forfeited his franchise, and that the same might be seized into the king's hand.

2 Inst. 43.

So, the Lady Broughton, keeper of the Gate-house prison in Westminster, was informed against, and upon not guilty pleaded, she was found guilty; and her crime was extortion of fees, and hard usage of the prisoners in a most barbarous manner; and after she had by her counsel moved in arrest of judgment and could not prevail, she had judgment given against her, viz., she was fined one hundred marks, removed from her office, and the custody of the prison was delivered to the sheriff of Middlesex, till the dean and chapter should farther order the same, *salvo jure cujuslibet*.

Raym. 216; 2 Lev. 71, Lady Broughton's case.

And by the 8 & 9 W. 3, c. 27, § 4, it is enacted, "That if any marshal or warden, or their respective deputy or deputies, or any keeper of any other prison within this kingdom, shall take any sum of money, reward, or gratuity whatsoever, or security for the same, to procure, assist, connive at, or permit any escape, and shall be thereof lawfully convicted, the said marshal or warden, or their respective deputy or deputies, or such other keeper of any prisons as aforesaid, shall for every such offence forfeit the sum of 500*l.* and his said office, and be for ever after incapable of executing any such office."

It hath been resolved, that a forfeiture by a jailer who hath but a particular interest, as of him who hath custody of a jail for life or years, does not affect him in remainder or reversion who hath the inheritance, but that upon such forfeiture his title shall accrue, and not go to the king.

Poph. 119; Lev. 71; Raym. 216; 3 Lev. 288.

But by the 8 & 9 W. 3, c. 27, § 11, it is enacted, "That the offices of marshal of the King's Bench prison, and warden of the Fleet, and each of

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them, shall be executed by the several persons to whom the inheritance of the prisons, prison-houses, lands, tenements, and other hereditaments of the said prisons of King's Bench and Fleet, or either of them, shall then belong or appertain respectively, in his or their respective proper person or persons, or by his or their sufficient deputy or deputies; for which deputy or deputies, and for all forfeitures, escapes, and other misdemeanors, in their respective offices, by such deputy or deputies permitted, suffered, or committed, the said person or persons, in whom the aforesaid inheritances respectively are, or shall then be, shall be answerable; and the profits and aforesaid inheritances of the said several offices shall be sequestered, seised, or extended to make satisfaction for such forfeitures, escapes, or misdemeanors respectively, as if permitted, suffered, or committed by the person or persons themselves, or either of them, in whom the respective inheritances of the said persons shall then be."

See 27 G. 2, c. 17.

|| By stat. 4 G. 4, c. 64, § 49, "in the altering, repairing, enlarging, building, or rebuilding of any jail or house of correction under this act, the justices shall adopt such plans as shall afford the most effectual means for the security, classification, health, inspection, employment, and religious and moral instruction of the prisoners; the building shall be so constructed or applied, and the keepers' and officers' apartments so situated as may best ensure the safety of the prison and facilitate the control and superintendence of those committed thereto; distinct wards and dry and airy cells shall be provided, in which prisoners of the several descriptions and classes hereinafter enumerated may be respectively confined; and it shall be considered as a primary and invariable rule, that the male prisoners shall in all cases be separated from the female, so as to prevent any communication between them; provision shall be made for the separation of the prisoners into the following classes:—

*"If a Jail.*

- "1. Debtors and persons confined for contempt of court in civil process.
- "2. Prisoners convicted of felony.
- "3. Those convicted upon trial of misdemeanor.
- "4. Those committed on charge or suspicion of felony.
- "5. Those committed on charge of misdemeanors or for want of sureties."

*"If a House of Correction.*

- "1. Prisoners convicted of felony.
- "2. Prisoners convicted upon trial of misdemeanors.
- "3. Those committed on charge or suspicion of felony.
- "4. Those committed on charge of misdemeanors.
- "5. Vagrants."

"Places of confinement shall also be set apart in every jail and house of correction for such prisoners as are intended to be examined as witnesses in behalf of the crown in any prosecutions, and such further means of classification shall be adopted as the justices shall deem conducive to good order and discipline; separate rooms shall be provided as infirmaries or sick wards for the two sexes, and as far as is practicable for the different description of prisoners; and warm and cold baths or bathing-tubs shall be introduced into such parts of the prison as may be best adapted for the use of the several classes; proper yards shall be allotted for the different classes for air

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and exercise, and each class shall have the use of a privy, and be furnished with a supply of good water ; a separate sleeping-cell shall, if possible, be provided for every prisoner ; but as the numbers may sometimes be greater than the prison is calculated to contain, under the arrangement required by this act, and as it is expedient that two male prisoners only should never be lodged together, a small proportion of cells or rooms shall be provided for the reception of three or more persons ; every prison shall contain rooms and places properly fitted up for the exercise of labour and industry ; and also a competent number of cells adapted for solitary confinement, for the punishment of refractory prisoners, and for the reception of such persons as may by law be confined therein ; a chapel shall be provided in every prison in such a convenient situation as to be easy of access to all the prisoners : it shall be fitted up with separate divisions for males and females, and also for the different classes ; it shall be strictly set apart for religious worship or for the occasional religious and moral instruction of the prisoners, and shall never be appropriated to or employed for any other purpose whatsoever ; in cases where the justices shall deem it necessary that the chaplain should reside, either occasionally or permanently within the prison or near to it, proper apartments shall be provided therein, or in the neighbourhood thereof, for the accommodation."

By stat. 5 G. 4, c. 85, § 10, reciting, "whereas in some other countries and places to which statute 4 G. 4, c. 64, extends, by reason of the small number of prisoners usually confined therein, it may not be necessary to provide the whole number of wards and airing grounds thereby required, but it is necessary to provide, that in all prisons some means of classification should be secured," it is enacted "that in every prison to which the said recited act extends, except Canterbury, Lichfield, and Lincoln, provision shall be made for the following classification at least.

"In all such jails the male and female prisoners shall be confined in separate wards or parts of the jail, the male prisoners shall be divided into five classes ; first, debtors and persons committed for contempt of court on civil process ; second and third, prisoners convicted ; who may be put into either of these classes as to the visiting magistrate may seem meet, reference being had to the character and conduct of the prisoners, and the nature of their offence : fourth and fifth, prisoners committed for trial, who may also be put into either of these two classes, as to the visiting magistrates may seem meet, reference in like manner being had to character and conduct of prisoners and the nature of their offence.

The female prisoners shall be divided at least into three classes : first, debtors and persons committed for contempt of court on civil process : second, prisoners convicted : third, prisoners committed for trial.

"In all such houses of correction the male and female prisoners shall also be confined in separate wards or parts of the house ; the male prisoners shall be divided into five classes : first and second, prisoners convicted ; who may be put into either of such classes as to the visiting magistrate may seem meet, regard being had to the character and conduct of the prisoners and the nature of their offence : third and fourth, prisoners committed for trials in all houses of correction where such prisoners are received, such prisoners may be put into either of these classes as to the visiting magistrate may seem meet, regard being had, as already mentioned, to the character and conduct of the prisoner and the nature of his offence : fifth, vagrants.

"In places where the jail and house of correction are united, the male



prisoners shall be divided into six classes at least : first, debtors and prisoners committed for contempt of court on civil process : second and third, convicted prisoners : fourth and fifth, those committed for trial ; such prisoners to be assigned to either of these classes of prisoners convicted or committed respectively as to the visiting magistrate shall seem meet, regard being always had to the character and conduct of the prisoners and the nature of their offence : sixth, vagrants.

“The female prisoners in each of such houses of correction shall be divided into three classes : first and second, prisoners convicted ; the prisoners to be put into either of such classes as to the visiting magistrate shall seem meet, regard being had to their character and conduct, and the nature of their offence ; vagrants shall be assigned to one or the other of these classes, as the visiting magistrates in their discretion may see meet : third, where females are committed to any house of correction before trial, they shall be kept in a class by themselves.”

By stat. 4 G. 4, c. 64, § 10, after reciting that, “whereas it is fit and proper to secure a uniformity of practice in the management of the several prisons to which this act shall extend,” it is enacted “that the following rules and regulations shall be observed and carried into effect in every such prison in England and Wales, which shall be maintained by any county or riding, or division of a county as aforesaid, as a jail or house of correction, and in the jail and house of correction of every district, city, town, or place mentioned in the schedule marked (A) annexed to this act, and in every united and contiguous jail and house of correction which shall be jointly used in manner aforesaid for the purposes of this act ; and in every prison authorized to be continued under this act as aforesaid in any county or riding, or division of a county, so far as such rules may be applicable or can be applied to the particular description or class of prisoners confined in such prison :—

“1. The keeper of every such prison shall reside therein ; he shall not be an under sheriff or bailiff, nor shall be concerned in any occupation or trade whatsoever ; no keeper or officer of a prison shall sell, nor shall any person in trust for him or employed by him sell or have any benefit or advantage from the sale of any article to any prisoner, nor shall he directly or indirectly have any interest in any contract or agreement for the supply of the prison.

“2. A matron shall be appointed in every prison in which female prisoners shall be confined, who shall reside in the prison ; and it shall be the duty of the matron constantly to superintend the female prisoners.

“3. The keeper shall, as far as may be practicable, visit every ward and see every prisoner, and inspect every cell once at least in every twenty-four hours ; and when the keeper or any other officer shall visit the female prisoners, he shall be accompanied by the matron, or in case of her unavoidable absence by some female officer of the prison.

“4. The keeper shall keep a journal in which he shall record all punishments inflicted by his authority, or by that of the visiting justices, and the day when such punishments shall have taken place, and all other occurrences of importance within the prison, in such manner as shall be directed by the regulations to be made under this act ; which journal shall be laid before the justices at every general or quarter sessions, to be signed by the chairman in proof of the same having been there produced.

“5. Due provision shall be made in every prison for the enforcement of hard labour, in the cases of such prisoners as may be sentenced thereto, and for the employment of other prisoners. The means of hard labour shall be

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provided, and the materials requisite for the employment of prisoners shall be purchased, under such regulations as may be made for that purpose by the justices in general or quarter sessions assembled. If the work to be performed by the prisoners be of such a nature as to require previous instruction, proper persons shall be appointed to afford the same.

“6. The male and female prisoners shall be confined in separate buildings or parts of the prison, so as to prevent them from seeing, conversing, or holding any intercourse with each other; and the prisoners of each sex shall be divided into distinct classes, care being taken that the prisoners of the following classes do not intermix with each other:—

*“In Jails.*

- “1. Debtors and persons confined for contempt of court on civil process.
- “2. Prisoners convicted of felony.
- “3. Prisoners convicted of misdemeanors.
- “4. Prisoners committed on charge or suspicion of felony.
- “5. Prisoners committed on charge or suspicion of misdemeanors, or for want of sureties.

*“In Houses of Correction.*

- “1. Prisoners convicted of felony.
- “2. Prisoners convicted of misdemeanors.
- “3. Prisoners committed on charge or suspicion of felony.
- “4. Prisoners committed on charge or suspicion of misdemeanors.
- “5. Vagrants.

“Such prisoners as are intended to be examined as witnesses in behalf of the crown in any prosecution shall also be kept separate in all jails and houses of correction: provided always, that nothing herein contained shall be construed to extend to prevent the justices from authorizing, at their discretion, the employment of any prisoner in the performance of any menial office within the prison, or for the purpose of instructing others: and provided also, that if the keeper shall at any time deem it improper or inexpedient for a prisoner to associate with the other prisoners of the class to which he or she may belong, it shall be lawful for him to confine such prisoner with any other class or description of prisoners, or in any other part of the prison, until he can receive the directions of a visiting justice thereon, to whom he shall apply with as little delay as possible, and who in every such instance shall ascertain whether the reason assigned by the keeper warrant such deviation from the established rules, and shall give such orders in writing as he shall think fit, under the circumstances of the particular case.

“7. Female prisoners shall in all cases be attended by female officers.

“8. Every prisoner sentenced to hard labour shall, unless prevented by sickness, be employed so many hours every day, not exceeding ten, exclusive of the time allowed for meals, as shall be directed by the rules and regulations to be made under this act, except on Sundays, Christmas Day, and Good Friday, and on any days appointed by public authority for fasting or thanksgiving.

“9. Prayers, selected from the Liturgy of the Church of England by the chaplain, shall be read at least every morning, by the chaplain, the keeper, or by some other person, as by the rules and regulations shall be directed; and portions of the scriptures shall be read to the prisoners, when assembled for instruction, by the chaplain, or by such person as he may appoint or authorize.

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"10. Provision shall be made in all prisons for the instruction of prisoners of both sexes in reading and writing, and that instruction shall be afforded under such rules and regulations, and to such extent, and to such prisoners, as to the visiting justices shall seem expedient.

"11. Prisoners under charge or conviction of any crime shall attend divine service on Sundays, and on other days when such service is performed, unless prevented by illness, or by other reasonable cause, to be allowed by the keeper, or unless their attendance shall be dispensed with by one of the visiting justices.

"12. No prisoner shall be put in irons by the keeper of any prison, except in case of urgent and absolute necessity; and the particulars of every such case shall be forthwith entered in the keeper's journal, and notice forthwith given thereof to one of the visiting justices; and the keeper shall not continue the use of irons on any prisoner longer than four days, without an order in writing from a visiting justice, specifying the cause thereof, which shall be preserved by the keeper as his warrant for the same.

"13. Every prisoner maintained at the expense of any county, riding, division, city, town, or place, shall be allowed a sufficient quantity of plain and wholesome food, to be regulated by the justices in general or quarter sessions assembled, regard being had (so far as may relate to convicted prisoners) to the nature of the labour required from or performed by such prisoners, so that the allowance of food may be duly apportioned thereto: and it shall be lawful for the justices to order for such prisoners of every description, as are not able to work, or being able cannot procure employment sufficient to sustain themselves by their industry, or who may not be otherwise provided for, such allowance of food as the said justices shall from time to time think necessary for the support of health. Prisoners under the care of the surgeon shall be allowed such diet as he may direct. Care shall be taken that all provisions supplied to the prisoners be of proper quality and weight. Scales and legal weights and measures shall be provided, open to the use of any prisoners, under such restrictions as shall be made by the regulations of each prison.

"14. Prisoners who shall not receive any allowance from the county, whether confined for debt, or before trial for any supposed crime or offence, shall be allowed to procure for themselves, and to receive at proper hours, any food, bedding, clothing, or other necessaries, subject to a strict examination, and under such limitations and restrictions, to be prescribed by the regulations to be made in manner directed by this act, as may be reasonable and expedient, to prevent extravagance and luxury within the walls of a prison; all articles of clothing and bedding shall be examined, in order that it may be ascertained that such articles are not likely to communicate infection or to facilitate escape.

"15. No prisoner who is confined under the sentence of any court, nor any prisoner confined in pursuance of any conviction before a justice, shall receive any food, clothing, or necessaries, other than the jail allowance, except under such regulations and restrictions as to the justices in general or quarter sessions assembled may appear expedient, with reference to the several classes of prisoners, or under special circumstances, to be judged of by one or more of the visiting justices.

"16. Due provision shall be made for the admission, at proper times, and under proper restrictions, of persons with whom prisoners committed for trial may desire to communicate; and such rules and regulations shall

be made, by the justices in general or quarter sessions assembled, for the admission of the friends of convicted prisoners, as to such justices may seem expedient; and the justices shall also impose such restrictions upon the communication and correspondence of all such persons with their friends, either within or without the walls of the prison, as they shall judge necessary for the maintenance of good order and discipline in such prison.

“17. The surgeon shall examine every prisoner who shall be brought into the prison before he or she shall be passed into the proper ward; and no prisoner shall be discharged from prison if labouring under any acute or dangerous distemper, nor until, in the opinion of the surgeon, such discharge is safe, unless such prisoner shall require to be discharged. The wearing apparel of every prisoner shall be fumigated and purified, if requisite, after which the same shall be returned to him or her, or in case of the insufficiency of such clothing then other sufficient clothing shall be furnished, according to the rules and regulations of the prison; but no prisoner, before trial, shall be compelled to wear a prison dress, unless his or her own clothes be deemed insufficient or improper, or necessary to be preserved for the purposes of justice; and no prisoner who has not been convicted of felony, shall be liable to be clothed in a parti-coloured dress; but if it be deemed expedient to have a prison dress for prisoners not convicted of felony, the same shall be plain.

“18. Every prisoner shall be provided with suitable bedding, and every male prisoner with a separate bed, hammock or cot, either in a separate cell, or in a cell with not less than two other male prisoners.

“19. The walls, and ceilings of the wards, cells, rooms, and passages used by the prisoners throughout every prison shall be scraped and lime-washed at least once in the year; the day-rooms, work-rooms, passages, and sleeping cells, shall be washed or cleansed once a week, or oftener if requisite, convenient places for the prisoners to wash themselves shall be provided, with an adequate allowance of soap, towels, and combs.

“20. All prisoners shall be allowed as much air and exercise as may be deemed proper for the preservation of their health.

“21. No tap shall be kept in any prison, nor shall spirituous liquors of any kind be admitted for the use of any of the prisoners therein, under any pretence whatever, unless by a written order of the surgeon, specifying the quantity and for whose use. No wine, beer, cider, or other fermented liquors, shall be admitted for the use of any prisoners, except in such quantities, in such manner, and at such times, as shall be allowed by the rules hereafter to be made in pursuance of this act.

“22. No gaming shall be permitted in any prison, and the keeper shall seize and destroy all dice, cards, or other instruments of gaming.

“23. No money under the name of garnish shall be taken from any prisoner on his or her entrance into the prison, under any pretence whatever.

“24. Upon the death of a prisoner, notice thereof shall be given forthwith to one of the visiting justices, as well as to the coroner of the district, and to the nearest relative of the deceased, where practicable.”

By stat. 4 G. 4, c. 64, § 40, “If any person in contravention to the existing rules shall carry or bring, or attempt or endeavour to carry or bring into any prison to which this act shall extend any spirituous or fermented liquor, it shall be lawful for the jailer or keeper, turnkey or any other of the assistants to the said jailer or keeper, to apprehend, or cause to be apprehended, such offender, and to carry him or her before a justice of the peace

## (D) Of the Duty and Power of Jailers.

(who is hereby empowered to hear and determine such offence in a summary way,) and if he shall lawfully convict such person of such offence, he shall forthwith commit such offender to the common jail or house of correction, there to be kept in custody for any time not exceeding three months, without bail or mainprize, unless such offender shall immediately pay down such sum of money, not exceeding 20*l.* and not less than 10*l.*, as the justices shall impose upon such offender to be paid, one moiety to the informer, and the other moiety in aid of the rate applicable to the maintenance of such prison; and if any justice shall receive information upon oath that any spirituous or fermented liquor is unlawfully kept or disposed of in any prison, he may enter and search, or issue his warrant to enter and search for such liquor, and in case it shall be found, it shall be lawful for the person so finding to seize the same and cause it to be disposed of as the justice shall direct; and if any jailer or keeper of any prison shall sell, use, lend, give away, or knowingly permit or suffer to be sold, used, lent or given away in such prison, or brought into the same, any spirituous or fermented liquor, in contravention of the existing rules of such prison, he shall for every such offence, over and above any other punishment by this act enacted, forfeit the sum of 20*l.*”

By the stat. 4 G. 4, c. 64, § 14, “the jailer and keeper of every jail and house of correction, maintained at the expense of any county, or of any such riding, or division of a county as aforesaid, in England and Wales, or maintained by any district, city, town, or place specified in the schedule to this act annexed marked (A), shall make a report in writing of the actual state and condition of every such jail and house of correction, and of the number and description of prisoners confined therein, to the justices at the several general or quarter sessions to be holden next after the commencement of this act, and at every ensuing general or quarter sessions in every such county, riding, division, district, city, town, or place, and shall at every such general or quarter sessions attend and give answer upon oath to all such inquiries as shall be made by the justices at such session, with respect to the state and condition of every such jail and house of correction, and of the prisoners confined therein, and with respect to any other matters and things relating to the said jail and house of correction, respecting which such justices shall deem it necessary to make any inquiry for the purpose of proceeding and continuing to carry this act into execution, and of ascertaining how far every such jail and house of correction is capable of affording the means of the classification required in this act.”

By § 19, “the keeper of every jail and house of correction to which this act shall extend shall, previously to the first day of every assizes, great session, or sessions of jail delivery, make out a true and just return in writing of all persons in his custody who have been sentenced to hard labour by the court at any previous assizes, great sessions, or sessions of jail delivery, specifying in such return the manner in which such sentences have been carried into execution, the particular species of labour in which such prisoners have been employed, and the average number of hours in a day for which such persons so sentenced have been kept to work, which return shall be signed by such keeper, and also by one at least of the visiting justices, who shall add thereto such observations as the case and circumstances may appear to him to require; and such return shall be delivered to the justice of assize and jail delivery, and of great sessions, and shall be kept and filed by the proper officer amongst the records of the court.”

## (D) Of the Duty and Power of Jailers.

§ 20, enacts "that the keeper of every prison within England and Wales having the custody of prisoners charged with felony, shall on the second day next after the termination of every session of the peace, session of oyer or terminer, or session of jail delivery, great session, or other session held for the trial of prisoners being in such prison, whether such session shall be held under any commission or by virtue of any charter or prescription, transmit by the post of that day to one of his majesty's principal secretaries of state a calendar containing the names, the crimes, and the sentences of every prisoner tried at such session, and distinguishing with respect to all prisoners capitally convicted, such of them as may have been reprieved by the court, and stating the day on which execution is to be done upon those who have not been reprieved; and that whenever the court shall adjourn for any longer time than one week, the day upon which the adjournment shall be made shall be deemed the termination of the session within the meaning of this act; and every keeper of every such prison who shall neglect or refuse to transmit such calendar, or shall wilfully transmit a calendar containing any false or imperfect statement, shall for every such offence forfeit the sum of 20*l*.

"§ 21. And for the better ensuring the strict observance of the rules and regulations to be made for the government of the prisons to which this act shall extend, it is enacted, at each quarter sessions of the peace, the keeper of every prison within the jurisdiction of the court holding such session shall and is hereby required to deliver, or cause to be delivered, to such court a certificate signed by himself, which certificate shall contain a declaration how far the rules laid down for the government of his prison had been complied with, and shall point out any and every deviation therefrom which may have taken place; and if any keeper of any prison shall neglect to deliver, or cause to be delivered, such certificate as aforesaid, he shall forfeit for every such offence the sum of 10*l*.

"§ 22. One week before the Michaelmas session in every year, the keeper of every prison to which this act shall extend shall make up a return of the state of his prison for the year then ending, in the form contained in the schedule annexed to this act marked (B), and shall deliver the same, or cause the same to be delivered, to the clerk of the peace or his deputy, for the use of the justices assembled at such quarter session.

"§ 40. If any jailer or keeper shall sell, use, lend, or give away, or knowingly permit to be sold, used, lent, or given away, in such prison, or brought into the same, any spirituous or fermented liquor, he shall for every such offence, over and above any other punishment by this act enacted, forfeit 20*l*.

"§ 41. The keeper of every prison shall have power to hear complaints touching any of the following offences; (that is to say,)

"1. Disobedience of any of the rules of the prison.

"2. Assaults by one person confined in such prison upon another, when no dangerous wound or bruise is given.

"3. Profane cursing and swearing.

"4. Any indecent behaviour, any irreverent behaviour at chapel, all of which are declared to be offences by this act, if committed by any description of prisoners.

"5. Absence from chapel without leave.

"6. Idleness or negligence in work, or wilful mismanagement of it, which are also declared offences by this act if committed by any prisoner

## (F) How maintained in Prison.

under charge or conviction of any crime; and the said keeper may examine any persons touching such offences, and may determine thereupon, and may punish all such offences by ordering any offender to close confinement in the refractory or solitary cells, and by keeping such offenders upon bread and water only, for any term not exceeding three days.”||

## (E) At whose Charge Prisoners are to be carried to Jail.

By the 3 Jac. 1, c. 10, it is enacted, “That all and every person and persons that shall be committed to the common or usual jail, within any county or liberty within this realm, by any justice or justices of the peace, for any offence or misdemeanor, having means or ability thereunto, shall bear their own reasonable charges for so conveying or sending them to the said jail, and the charges also of such as shall be appointed to guard them to such jail, and shall so guard them thither; and if any such person or persons, so to be committed as aforesaid, shall refuse at the time of their commitment, and sending to the said jail, to defray the said charges, or shall not then pay or bear the same; that then such justice or justices of the peace shall and may by writing under his or their hand and seal, or hands and seals, give warrant to the constable or constables of the hundred, or constable or tithing-man of the tithing or township where such person or persons shall be dwelling and inhabit, or from whence he or they shall be committed as aforesaid, or where he or they shall have any goods within the county or liberty, to sell such and so much of the goods and chattels of the said persons, as by the discretion of the said justice or justices of the peace shall satisfy and pay the charges of such his or their conveying and sending to the said jail; the appraisement to be made by four of the honest inhabitants of the parish or tithing where such goods and chattels shall remain and be, and the overplus of the money which shall be made thereof, to be delivered to the party to whom the said goods shall belong.”

By 27 G. 2, c. 3, the expense of conveying poor offenders to jail, or the house of correction, is to be paid by the treasurer of the county, except in Middlesex.

## (F) How maintained in Prison.

By (a) some opinions, a jailer is compellable to find his prisoner sustenance; but as this is denied by (b) others, and as there are several statutes which provide for the maintenance of prisoners, without supposing the jailer any way obliged to it, it seems this opinion is not maintainable.

(a) As 9 Co. 87, so Co. Lit. 295 a, where my Lord Coke says, that in an action of debt by a jailer against the prisoner for his victuals, the defendant shall not wage his law; for he cannot refuse the prisoner, and ought not to suffer him to die for default of sustenance; otherwise it is for tabling a man at large. *β* Love v. Lowry, 1 M.Cord, 181. *γ* [This privilege, that the defendant shall not wage his law, appears to be given to the jailer, not because he is compellable to maintain the prisoner, as Lord Coke supposeth, but merely as a reward or additional incitement to the exercise of humanity; and in that sense it seems to be explained by the court in 1 Ld. Rolle's Reports, 338, where it is said, “that the defendant shall not in such case wage his law, because it is a work of charity;” and therefore the jailer has not the same remedy for provisions thus supplied to the prisoner, as he has for the customary fees due to him, that of detaining him in prison till payment.—The editor is indebted for this remark to the case from Ely above referred to.] (b) As Plow. 68 a; 2 Roll. Abr. 32. *β* In Virginia, the sheriff, as jailer, is bound to furnish a runaway committed to jail, with such supplies as are requisite for the season of the year. *Dabney v. Tالياfero*, 4 Rand. 256. *γ*

By the 14 Eliz. c. 5, it is enacted “That it shall and may be lawful for the justices of peace of every shire within this realm, at their general quarter sessions of the peace to be holden within the same shires, or the most part

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of the said justices, being then present, to rate and tax every parish within the said shires, at such reasonable sums of money, for and towards the relief of prisoners, as they shall think convenient, by their discretions, so that the said taxation and rate doth not exceed above *6d.* or *8d.* by the week, out of every parish; and the churchwardens of every parish within this realm, for the time being, shall every Sunday levy the same, and once every quarter in the year pay to the high constables or head officers of every town, parish, hundred, riding, or wapentake within this realm, all such sums of money as their parish shall be rated and taxed, for and towards the relief of the said prisoners within their said several parishes; and that the said high constables and head officers, and every of them, shall pay all such sums of money so to them paid by the said churchwardens, at every general quarter sessions, to be holden within the said several shires, to sufficient persons dwelling nigh the said jails, as shall be appointed by the said justices in their said open quarter sessions, to be there ready to receive the said money so collected as is aforesaid; and that the collectors for the said prisoners shall weekly distribute and pay all such sums of money as they and every of them shall receive for the relief of the said prisoners as aforesaid; upon pain, as well the said churchwardens of every parish, constables and head officers of every hundred or wapentake, as also the said collectors appointed for the collection and contribution of the said prisoners so making default as aforesaid, to forfeit *5l.*, the one moiety thereof shall be to the use of the queen's majesty, her heirs and successors, and the other moiety to the relief of the prisoners.

“Provided, That the justices of peace within any county of this realm or Wales, shall not intronit or enter into any city, borough, place, or town corporate, where be any justice or justices of peace for any such city, borough, place or town corporate, for the execution of any branch, article, or sentences of this act, for or concerning any offence, matter, or cause growing or arising within the precincts, liberties, or jurisdictions of such city, borough, place, or town corporate; but that it may and shall be lawful to the justice and justices of the peace, mayor, bailiffs, and other head officers of those cities, boroughs, places and towns corporate, where there be justice or justices, to proceed to the execution of this act within the precinct and compass of their liberties, in such manner and form as the justices of peace in any county may or ought to do within the same county by virtue of this act; any matter or thing in this act expressed to the contrary thereof notwithstanding.”

And by the 19 Car. 2, c. 4, it is enacted, “That the justices of peace of the respective counties, at any their general sessions, or the major part of them then there assembled, if they shall find it needful so to do, may provide a stock of such materials as they find convenient for the setting poor prisoners on work, in such manner and by such ways as other county charges by the laws and statutes of the realm are and may be levied and raised, and to pay and provide fit persons to oversee and set such prisoners on work; and make such orders for accounts of and concerning the premises, as shall by them be thought needful, and for punishment of neglects and other abuses, and for bestowing the profit arising by the labour of the prisoners so set on work for their relief, which shall be duly observed, and may alter, revoke, or amend such their orders from time to time. Provided, that no parish be rated above *6d.* by the week towards the premises, having respect to the respective values of the several parishes.”

See stat. 31 G. 3, c. 46.



## (F) How maintained in Prison.

By the 22 & 23 Car. 2, c. 20, § 10, it is enacted, "That every undersheriff, jailer, keeper of prison or jail, and every person or persons whatsoever, to whose custody any person or persons shall be delivered or committed by virtue of any writ or process, or any pretence whatsoever, shall permit and suffer the said person or persons, at his and their will and pleasure, to send for and have any beer, ale, victuals, and other necessary food, where and from whence they please; as also to have and use such bedding, linen, and other things, as the said person or persons shall think fit, without any purloining, detaining, or paying for the same, or any part thereof."

The like clause in 2 G. 2, c. 22, § 3, and 32 G. 2, c. 28, § 4. [But such clause does not exclude a limitation of the quantity of liquor allowed to each person. Lord Loughborough's Observations on English Prisons, 31.]

By the 2 Geo. 2, c. 22, it is enacted, "That the lords chief justices, lord chief baron, judges of assize, and justices of the peace, in their respective jurisdictions, and all commissioners for charitable uses, do their best endeavours and diligence to examine and discover the several gifts, legacies, and bequests bestowed and given for the benefit and advantage of the poor prisoners in the said several jails and prisons, and to send for any deeds, wills, writings, and books of account whatsoever, and any person or persons concerned therein, and to examine them upon oath to make true discovery thereof, (which they have full power and authority to do,) and to order and settle the payment, recovery, and receipt of the same, when so discovered and ascertained, in such easy and expeditious manner and way, that the prisoners for the future may not be defrauded, but receive the full benefit thereof according to the true intent of the donors; and that lists or tables of such gifts, legacies, and bequests, for the benefit of the prisoners in every jail or prison respectively, fairly written, shall be likewise hung up in such jails and prisons respectively, in some open room or place, to which the prisoners may have resort, as occasion shall require, without fee, and shall be registered by the clerks of the peace of the respective counties and places in manner aforesaid."

Like clause in 22 & 23 Car. 2, c. 20, § 12, and 32 G. 2, § 9.

|| By 52 G. 3, c. 160, reciting that great distress is suffered by poor persons confined under mesne process for debt in such jails as are not county jails, in consequence of their not receiving any allowance whereon to subsist during the time of such confinement, it is enacted, "That it shall be lawful for any one justice of the peace acting for the county, riding, or division wherein any jail which is not a county jail is situated, to order the overseers of the poor of the parish, township, or place wherein any such jail (which is not a county jail) shall be situated, to relieve any poor person who shall be confined in such jail under mesne process for debt, and who shall appear to such justice to be unable to support himself or herself, and who shall have applied for relief to such overseers as aforesaid."

§ 2. "Provided, that the sum to be given for the relief of any such poor person shall not exceed sixpence *per diem*, during the time of his or her confinement in such jail under mesne process for debt."

By § 3. "The overseers of the poor of any such parish, township, or place to whom any such application for relief shall be made as aforesaid, if they shall doubt whether such poor person is legally settled in such parish, township, or place, shall cause him or her to be examined upon oath before one or more justice or justices of the peace, touching his or her last legal settlement, upon which examination it shall be lawful for justices to make

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an order for the removal of such poor person to the place of his last legal settlement, and to suspend the execution of such order of removal during the time of such person being confined in such jail under such mesne process, which suspension of the same shall be endorsed on the said order, and signed by such justices, and the subsequent permission to execute the same shall be also endorsed on the said order, and signed by such justices, or by any other two justices of the peace acting for the same county, riding, or division."

§ 4. "Provided, that a copy of the order of removal, and of the order for suspending the execution of the same as aforesaid, shall, as soon as may be after the making thereof respectively, be served upon the overseers of the poor of the parish, township, or place in which such poor person shall by such order of removal be adjudged to be legally settled."

§ 5. "And it is further enacted, that although such poor person shall not have been actually removed in pursuance of such order of removal as aforesaid, it shall be lawful for any justice of the peace to direct the overseers of the poor of the parish, township, or place in which such pauper is adjudged to be settled, to repay to the overseers of the poor of the parish, township, or place wherein such jail shall be situated, all the charges proved upon oath of any such overseers of the parish, township, or place where the jail is situated, to have been incurred in granting relief to such pauper during the time of his confinement and the suspension of such order, not exceeding sixpence *per diem*; and if the overseers of the parish, township, or place to which such order of removal shall be made, or any or either of them, shall refuse or neglect to pay any such sum so advanced as aforesaid within twenty-one days after demand thereof, and shall not within the same time give notice of appeal as is hereinafter mentioned, it shall be lawful for one justice of the peace, by warrant under his hand and seal, to cause the money so directed to be paid as aforesaid to be levied by distress and sale of the goods and chattels of the person or persons so refusing or neglecting to pay the same, and also such costs attending the same, not exceeding forty shillings, as such justice shall direct; and if the parish, township, or place to which the removal was ordered to be made, be without the jurisdiction of the justice of peace issuing the warrant, then such warrant shall be transmitted to any justice of the peace having jurisdiction within such parish, township, or place as aforesaid, who upon receipt thereof is hereby authorized and required to endorse the same for execution: Provided, nevertheless, that if the sum so ordered to be paid on account of such costs and charges exceed the sum of five pounds, the party or parties aggrieved by such order may appeal to the next general quarter sessions for the county, riding, or division in which such jail is situated, against the same, as they may do against an order for the removal of poor persons by any law now in being, and if the court of quarter sessions shall be of opinion that the sum so awarded be more than of right ought to have been directed to be paid, such court may and is hereby directed to strike out the sum contained in the said order, and insert the sum which in the judgment of the said court ought to be paid, and in every such case the said court of quarter sessions shall direct that the said order so amended shall be carried into execution by the said justices by whom the order was originally made, or either of them, by such other justice or justices as the said court shall direct.

§ 6. "Provided that it shall be lawful for the overseers of the poor of the parish, township, or place wherein such poor person shall, by such order of

## (G) Of the Offence of breaking Gaol.

removal, be adjudged to be legally settled, to appeal against such order to the next general quarter sessions of the peace for the county, riding, or division in which such jail is situated, holden after the service of the copy of such order of removal, in case such copy shall have been served upon such overseers twenty-one days before the holding of such quarter sessions, but in case the same shall not be served twenty-one days before the holding of such next general quarter sessions, then the appeal may be to the next succeeding general quarter sessions holden for the said county, riding, or division, and upon such appeal the like proceedings may be had as are observed in other cases of appeals against orders of removal of poor persons by any law now in being: Provided always, that in case such order of removal and suspension is not appealed against in manner aforesaid, or if upon appeal such order shall be confirmed, such poor person shall be deemed and taken to be legally settled in the parish, township, or place in which he shall by such order of removal be adjudged to be legally settled."

§ 7. "And it is further enacted, that in case any poor person applying for relief under the provisions of this act shall, upon his examination as to his last legal settlement, be found not to be legally settled in any parish, township, or place within England and Wales, it shall be lawful for any one justice of the peace to order the overseers of the poor of the parish, township, or place wherein the jail is situated (in which such poor person shall be confined under mesne process for debt) to relieve such poor person with a sum not exceeding sixpence *per diem* out of the funds in their hands applicable to the relief of the poor, which sum shall be reimbursed to the overseers of the poor of the said parish, township, or place, for the use of such funds, out of the county rate, by the treasurer of the county, riding, or division in which such parish, township, or place shall be situated, at the expiration of the confinement of such poor person upon such mesne process as aforesaid."||

## (G) Of the Offence of breaking Jail.

THE offence of breaking a jail or prison by the common law was no less than felony; and this, whether the party were committed in a criminal or civil case, or whether he were actually in the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him, or whether he were in the king's prison, or one belonging to a lord of a franchise.

2 Inst. 589; Staundf. P. C. 31; Cro. Car. 210. *ℒ* One who breaks prison and escapes when imprisoned upon an indictment found, or under a regular commitment under the hand and seal of a justice of the peace, for a particular felony or suspicion thereof, plainly set forth in the warrant, is guilty of felony, and this without his being indicted, tried, or convicted of the principal felony. Comm. v. Miller, 2 Ashm. 61.*g*

But now by the 1 E. 2, st. 2, the severity of the law is relaxed and the breaking of prison is(*a*) only felony, as therein declared. *De prisonariis frangentibus prisonam dominus rex vult et præcipit, quod nullus de cætero, qui prisonam fregerit, subeat vitæ vel membrorum damnum pro fractione prisonæ tantum, nisi causa præ qua captus et imprisonatus fuerit tale iudicium requirit, si de illa secundum legem et consuetudinem terræ fuisset convictus, licet temporibus præteritis aliter fieri consuevit.*

2 Inst. 589. || In the 23 E. 1, an act was passed in the very words of this act. That act is not in our printed books; and this of 1 E. 2, which was nothing more than a recital or affirmation of the former, (2 Inst. 589,) has had the success to reach posterity, and render the former unnecessary, and, therefore, forgotten. Reeves's Hist. vol. ii.

## (G) Of the Offence of breaking Gaol.

290.¶ (a) But offences of this kind, which are not felony within 1 E. 2, are still punishable as high misprisions by fine and imprisonment. Hale's P. C. 116; 2 Hawk. P. C. c. 18.

In the construction of this statute the following opinions have been holden:

1. That any place whatsoever, wherein a person under a lawful arrest for a supposed capital offence is restrained from his liberty, whether in the stocks or street, or in the common jail, or the house of a constable or private person, or the prison of the ordinary, is a prison within the statute.

2 Inst. 589; Dyer, 99, pl. 60; Crompt. 38; Cro. Car. 210; Hale's P. C. 107.

2. That if the party who breaks from prison was taken on a *capias* on an indictment or appeal, it is not material, whether any such crime, as of that which he is accused, were in truth committed, or not, for there is an accusation against him on record, which makes the commitment lawful, be he ever so innocent.

2 Inst. 590; Hale's P. C. 109.

Also, if an innocent person be committed by a lawful *mittimus* on such a suspicion of felony, actually done by some other, as will justify his imprisonment, though he be neither indicted nor appealed, he is within the statute if he break the prison, for that he was legally in custody, and ought to have submitted to it till he had been discharged by due course of law.

Hale's P. C. 109; 2 Inst. 590; Dyer, 99, pl. 60; Crompt. 38 a.

But, if no felony at all were done, and the party be neither indicted nor appealed, no *mittimus* for such a supposed crime will make him guilty within the statute by breaking the prison, for that his imprisonment was unjustifiable.

Hale's P. C. 106; 2 Inst. 590, *cont.*; 2 Leon. 166.

Also, if a felony were done, yet if there were no just cause of suspicion enough to arrest or commit the party, and the *mittimus* be not in such form as the law requires, his breaking of the prison cannot be felony, because the lawfulness of the imprisonment, in such case, depends wholly on the *mittimus*, which, if it be not according to law, the imprisonment will have nothing to support it.

2 Inst. 591; H. P. C. 109; 2 Hawk. P. C. c. 18, § 8.

3. That there must be an actual breaking; for the words *felonice fregit prisonam*, which are necessary in every indictment for this offence, cannot be satisfied without some actual force or violence; and therefore if the prisoner, without the use of any violent means, go out of the prison doors, which he finds open by the negligence or consent of the jailer; or, if he escape through a breach made by others without his privity; he is guilty of a misdemeanor only, and not of felony.

2 Inst. 589, 590; Hale's P. C. 108; Staundf. P. C. 31.

Nor will the breaking of prison, which is necessitated by an inevitable accident, happening without any default of the prisoner, as, where the prison is fired by lightning, or otherwise, without his privity, and he breaks out to save his life, come within the statute.

Plow. 136; 2 Inst. 590; Hale's P. C. 108.

Nor is it felony to break a prison, unless the prisoner escape.

Keilw. 87 a.

4. That if the imprisonment be for an offence made capital by a subse-

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quent statute, the breach of prison is as much within the act of 1 E. 2, st. 2, as if the offence had always been felony. But if the offence, for which a man is committed, were but a trespass at the time when he breaks the prison, and afterwards become felony by matter subsequent, as, where one committed for having dangerously wounded a man, who afterwards dies, breaks the prison before he dies, the fiction of law, which to many purposes makes the offence a felony *ab initio*, shall not be carried so far as to make the prison breach also a felony, which at the time when it was committed was but a misdemeanor.

Hale's P. C. 108; 2 Inst. 591; Plowd. 258.

Also, it seems the better opinion, that if the offence, for which the party was committed, be in truth but a trespass, the calling it felony in the *mittimus* will not make the breaking of the prison amount to a felony; and that on the other side, if the offence were in truth a capital one, the calling it a trespass in the *mittimus* will not bring it within the statute; for the cause of the imprisonment is what the statute regards, and that is the offence, which can neither be lessened nor increased by a mistake in the *mittimus*.\*

But for this vide 2 Hawk. P. C. c. 18, § 14. \*But vide Hawk. for the opinions differ, and he leaves it in doubt.

5. That the breach of prison by a person attainted is within the statute, though his crime doth not now require any judgment, because it hath been given already, whereby he is out of the strict letter of the statute, but clearly still within the meaning of the words.

2 Hawk. P. C. c. 18, § 16.

6. That the offence of breaking prison is but felony, whatsoever the crime were for which the party was committed, unless his intent were to favour the escape of others also who were committed for treason, for that will make him a principal in the treason.

2 Hawk. P. C. c. 18, § 17.

7. That he that breaks prison may be proceeded against for such crime before he be convicted of the crime for which he is committed, because the breach of prison is a distinct independent offence; but the sheriff's return of a breach of prison is not a sufficient ground to arraign a man without an indictment.

2 Hawk. P. C. c. 18, § 18.

8. That it is not sufficient to indict a man generally for having feloniously broken prison; but the case must be set forth specially, that it may appear that he was lawfully in prison, and for a capital offence.

Hale's P. C. 109.

By the 16 Geo. 2, c. 31, assisting a prisoner to escape from any jail, although no escape be actually made, in case such prisoner then was attainted or convicted of treason or any felony, except petit larceny, or lawfully committed to, or detained in jail for treason, or any felony except petit larceny, expressed in the warrant of commitment, or detainer, is made felony, and the person assisting, &c., is to be transported for seven years; and in case such prisoner then was convicted of, committed to, or detained in any jail, for petty larceny, or other crime not being treason or felony, expressed in the warrant of commitment, &c., or then was in jail upon process for any debt, damages, &c., amounting to 100*l.*, every person so offending, &c., shall be adjudged guilty of a misdemeanor, for which he shall be liable to fine and imprisonment.

2 Inst. 591.

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|| By § 2, of the same statute, any person conveying or causing to be conveyed into any jail or prison, any vizard or other disguise, or any instrument or arms proper to facilitate the escape of prisoners, and the same delivering or causing to be delivered to any prisoner or other person in the jail, for the use of any such prisoner, without the privity and consent of the keeper or under-keeper of the jail; such person, although no escape or attempt to escape be actually made, shall be deemed to have delivered such vizard or other disguise, instrument or arms, with an intent to assist such prisoner to escape; and shall be subject to the same punishments as mentioned in the preceding clause.

A person is not amenable under this act for facilitating the escape of a prisoner committed only upon suspicion; for by the words "treason or felony expressed in the warrant," the legislature evidently meant the offence should be "clearly and plainly expressed," which cannot be where the commitment is on *suspicion* only.

R. v. Walker, 1 Leach's Ca. 97.

The felony created by this statute is the aiding any prisoner in an *attempt* to make his escape; if an *actual escape* ensues, the aiding in it is not within the statute.

R. v. Tilley, 2 Leach's Ca. 662.

If the indictment charge that the prisoner aided and assisted in an attempt to escape, it need not state that the party aided did attempt to make the escape, for the prisoner could not have aided if no such attempt had been made.

R. v. Tilley, 2 Leach's Ca. 662.||

[The extensive inquiries of the late Mr. Howard into the state of prisons, have lately excited the attention of the legislature to this subject, and the reader will find a variety of important provisions, too numerous to detail in a work of this kind, in stat. 19 Geo. 3, c. 54; 24 Geo. 3, sess. 2, c. 54, 55; 31 Geo. 3, c. 46; 34 Geo. 3, c. 84; 13 Geo. 3, c. 58; 22 Geo. 3, c. 64; 55 Geo. 3, c. 48. See also 50 Geo. 3, c. 103; and 57 Geo 3, c. 71, relating to jails in Ireland.]

## GAVELKIND.

(A) Of the Original, Continuance, and several Properties of this Custom.

(B) The particular Cases which have been adjudged relating to this Custom.

(A) Of the Original, Continuance, and several Properties of this Custom.

OF the many opinions concerning the original of this custom the most probable seems to be, that it was first introduced by the Roman clergy, and therefore propagated more extensively in Kent, because there the Christian religion was first propagated.

[For the etymology of the word *gavelkind*, and the origin, antiquity, and universality

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of this custom, see the three first chapters of Mr. Robinson's Common Law of Kent; and see also Mr. Whitaker's Hist. of Manchester, vol. i. p. 360.] This tenure is reckoned by the best antiquaries to be the same with the *Saxon bockland*, which was allodial and exempt from the feudal services. Somner, 12, 35, 37.

How this property came to escape, and to remain entire down to the people of Kent from their Saxon ancestors, is not agreed among the several antiquaries. Some of them tell us, that the Kentishmen came with boughs, and demanded their customs to be confirmed by the Conqueror, or else resolved to oppose his march. Others reject that story as a monkish fable, and think the Kentishmen submitted, and that the custom came with Odo, bishop of Bayeux, from Normandy; which hath less probability, considering the many exemptions of the Kentish lands from feudal slavery. Probably, notwithstanding the rejecting of this story (a) as to the opposition of the Conqueror with arms, it might thus far be true, that they came with their boughs to submit themselves to him on his first entry, and might petition for the establishment of their rights and customs; and the Conqueror, who was a very politic prince, might, to gain reputation with his new people, show this instance of his clemency; which seems the more probable, because the monks, the historians of those times, drop the story, and we all know they have not been at all favourable to his character; and the romantic part of the story might be invented by Spot, to aggrandize his own monastery.

Seld. Jan. 129; Crag. 13; Taylor's History of Gavelkind, 132, 171; Somner 12; 2 N. R. 506, 507. (a) || This story is the fiction of later ages, and was unknown to the earlier writers. The words of Pictaviensis, who was with the army at the time, are, *Occurrunt ultro Cantuarii haud procul a Dovera, jurant fidelitatem, dant obsides.* Pict. 138.||

The first quality of this land was, that it was alienable, without any license, according to the true nature of the Roman patrimonial property, and very different from the feudal servitude.

Their grants were likewise patrimonial, in nature of the contracts in the Roman law, and without any feudal words or reservation of tenure. Somner, 88.

The next property is, that these lands are not forfeitable for felony, but for treason they are; for the feudal forfeitures only held in lands where there were tenures, and not in the allodial property; and the allodial property was only forfeitable, according to the Roman civil law, for the *crimen læsæ majestatis*; and therefore the clergy, who were judges with the earl, never allowed this land to be forfeited but for the crime of high treason. But subsequent statutes comprehend gavelkind, because such laws extend to the whole land of the kingdom, unless gavelkind were excepted. But, if a man be outlawed, or abjure the realm for felony,\* he shall forfeit his lands in gavelkind, and his wife her dower in them; and though the strictness in which the custom is to be taken, because derogatory from the common law, is usually given as a reason for this construction, yet the true reason is, that outlawry and abjuring the realm are punishments introduced since the Conquest, and, consequently, since the establishment of gavelkind in Kent, and therefore, like other new laws, shall extend to that custom.

Lamb. 610, 611; Bro. tit. *Custom*, 54. \*Gavelkind lands in Kent, belonging to felons, revert to the heir after the year and day. 17 E. 2, st. 1, c. 16. If outlawed or abjured, the custom does not prevail. Dyer, 310 b, *in margine*.

Where any tenant died, his heir within age, the lord of the manor might and did commit the guardianship to the next relation in the court of justice within whose jurisdiction the land was; but the lord was bound on all

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occasions to call him to an account, and if he did not see that the accounts were fair, the lord himself was bound to answer it. This province the chancellor hath taken from inferior courts since the Conquest, only in Kent, where these customs are continued; but the custom is not used even in Kent to this day, because the lords, in giving tutors, do it at their own peril in the account, and therefore every man thinks it dangerous to intermeddle.

Lamb. 611, 612, 624.

The infant at fifteen was reckoned at full age to sell for money: this they undoubtedly took from the civil law, which reckons fourteen the *ætas pubertatis*; for they reckoned, that though the infant had ended his years of guardianship at fourteen, yet he might not have completed his account with his guardian till the age of fifteen, and that was esteemed to be the age when he was completely out of guardianship.

Lamb. 624; 3 Atk. 711.

This guardian appointed by the lord is to have the same allowance, and no other, with the guardian in socage at common law, and is subject to the account of the heir for his receipts, and to the distress of the lord for the same cause.

Lamb. 624.

The liberty of selling was allowed at the age of fifteen for the convenience and necessity of commerce, which in these small divided shares was absolutely necessary; yet it was allowed under such limitations and restrictions, that the infant could not be wronged or imposed upon: therefore an infant that sells must have a valuable consideration, because otherwise it is a plain sign that he was defrauded. If a woman sold at the age of fifteen *causâ matrimonii prælocuti*, this was a good conveyance; for marriage was reckoned to be a good and sufficient consideration.

Lamb. 625; And. 193.

It must pass by feoffment, and the livery upon the feoffment must be made by the infant in person, because an infant cannot appoint an attorney by the common law; and since the express words of the custom do not derogate from the common law in that point, an equitable construction shall not be admitted to make it derogate, for all customs are to be construed strictly.

Lamb. 628. Whether the ceremony of livery was ever annexed to those allodial grants in the Saxon times, or whether it came in with the feudal grants, seems doubtful; yet, if the lands did formerly pass by a grant, when the other way of conveyance was introduced, they always past them by feoffment, as the most solemn manner; for subsequent laws having made that solemn ceremony before the men of the country absolutely necessary to convey land, the ceremony past without distinction into the being of this custom, and so it hath always, I suppose, continued ever since the Norman times. But it hath been doubted, whether a lease and release will not be a good sale, as amounting to a feoffment. 9 Co. 76; Roll. Abr. 568; Lamb. 625.

This custom, like all others that are derogatory from the common law, is to be construed strictly; because as far as the particular custom hath not derogated from the law, the general custom of the whole kingdom ought to prevail; and we are not to presume that the particular custom goes farther than by notorious facts may appear; therefore in this case, if an infant in gavelkind be disseised, and release to his disseisor, or release to a discontinuee, it is not within the custom, and therefore void; so, if he make a feoffment with warranty, the warranty is not comprehended within the custom, and so void; for the custom reaches no farther than a conveyance by a naked feoffment.

Roll. Abr. 568.



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It must be land in possession, and not in reversion or remainder, because the true value of a reversion or remainder cannot be known or computed, and therefore the greater need of more than ordinary discretion in such a case, which is not found in infants. Besides, a reversion or remainder could not be immemorial; and therefore the custom could not be thereunto appendant, because the immemorial customs only were confirmed by the Conqueror; so that since the Norman conquest such a sale cannot be adjudged legal.

Bendl. 33, pl. 52; Lamb. 627.

It must be land coming by descent, and not by purchase, because the infant's purchase could not be a subject-matter for the custom; for the Conqueror must, as has been already said, be presumed to confirm nothing but a privilege that is immemorial; therefore it must be governed by the general laws of the kingdom.

Bendl. 33, pl. 52; Lamb. 627.

An infant in gavelkind shall have his age, and all other privileges of the infant at common law, because though he hath the privilege of alienation at fifteen, yet that doth not take from him any privilege he had before at the common law.

Roll. Abr. 144.

As to the *geld*, or *allodial rent* which was reserved upon the lands, the lord might distrain, having the same privilege for his rent as when the tenant held it *in modum beneficii*; for though the lord parted with the lands, yet the rent still remained to be the lord's as it was before, and therefore he had the same remedy for it, as all other persons had for rents reserved out of feudal lands. But, if the land lay fallow, and did not afford the lord his rent, the lord after such cessing of his tenant ought, by award of his three weeks' court, to seek whether there were distress to answer his rent, and this award of the court ought to be executed in the presence of good witnesses; and the same ought to be renewed for three courts till the fourth court, and in the fourth court it shall be awarded, that the lord shall take the tenements into his hands as a distress or pledge for the rents and services, and shall detain them for a year and a day without manuring them; within which time, if the tenant come and make agreement with the lord for his arrears, he shall take the lands into his hands again; but if he come not within that space, the lord ought openly to declare all his proceedings to the county-court, which being done likewise at his own court next following, the land shall be finally awarded to him.

Lamb. 612.

We come now to the descent to all the children, which runs through all the lands in Kent, and it is probable that all *bocklands* in England were thus partible, though it further happened, that all the lands in Kent were allodial without villain, and for the most part without copyhold; for it is a sufficient plea in villenage to say, that the defendant's father was born in Kent, though not to say, that the party himself was born there; because for the father to be born there is a supposition that the defendant could by no means be a villain, that being a country totally free: it is probable that this happened, because they made all their slaves allodial proprietors, Kent being, by reason of the *cinque ports*, a trading country; and they were better pleased with the rent, than if they had their work in specie; and this country being untouched by the Conqueror, there could be no villains.

Lamb. 628.

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As to the descent, that it was, it seems, introduced by the notions of the clergy from the Roman law, where all the land was equally divided among the children and next relations, so are the laws of the Confessor.

Seld. Jur. of Intestates, 26.

But there is a great difference between the descent of gavelkind land and the words of purchase of the same land; for, if a remainder be limited to the right heir of J S, the heir at common law shall take it, and not the heirs in gavelkind; the reason is, because this remainder, being newly created, could not be reckoned to be within the old custom; for the confirmation of the Conqueror was only of the old privileges, by which the land had been enjoyed, and not to make exposition of any grant afterwards arising.

Co. Lit. 10; Lamb. 607; Hob. 31; Rob. Gav. 117.

[But, if a man has lands of the custom of borough-english, and likewise lands at common law; and having two sons, devises the latter to his heir, according to the custom of borough-english, the youngest son shall take, and the devise shall not be defeated because he is not heir at common law, his elder brother being alive; since that was probably the reason of his making the devise, as the latter would have descended to him, had his brother been dead. So, if a man having gavelkind lands, devises other lands to his heirs in gavelkind, all his sons shall take as sufficiently described by this devise, though not heirs by the common law.

Newcomen v. Barkham, 2 Vern. 732; Pr. Ch. 464.

And if a man, seised in fee of lands in gavelkind, make a gift in tail, or lease for life to J S, remainder to his own right heirs, it seems, all his sons shall take by the name of heirs; for the remainder limited to the right heirs of the donor is only a reversion, he bearing in himself during his life (in judgment of law) all his heirs, and, therefore, the heir shall have it by descent.

Co. Lit. 22 b; Dav. 31 a.

So, if a man seised of lands in gavelkind, make a feoffment to the use of himself and his wife in tail, remainder to his own right heirs, this remainder shall go to the heirs by the custom. For it is the old use, and the heirs take by descent, their ancestor having a precedent estate of freehold, and not by purchase.

26 H. 8, 4 b; Bro. Custom, pl. 1; Lamb. 548; Rob. Gav. 119. See Mr. Hargrave's learned notes, Co. Lit. 10 a, n. 3, 27 b.]

And as to lands descending, the custom is the law of the place, and cannot be altered but by act of parliament, for being the ancient Saxon law, and still continuing under the Normans, it cannot be altered but by the legislature; therefore, if lands escheat to the crown, and be enjoyed in several descents, and be after granted out by the king in knight's service, yet they descend in gavelkind; for the law of the place cannot be controlled by the king's charter.

14 H. 8, 9; 26 H. 8, 4; Noy, 15.

|| So, where a rectory in Kent, formerly belonging to one of the dissolved monasteries, had been granted by Hen. 8 to a layman, to be holden in fee by knight's service *in capite*, the lands were determined to be descendible according to the custom; but the tithes according to the common law. The appropriation of the land to the religious house could not alter its nature: while in possession of the house, it could go to no children; but, as soon as it was given up, and granted by the crown, the custom attached

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upon it, and it must have been holden according to its ancient tenure. But with respect to the tithes, a layman was incapable of having any tithes, until the dissolution of the monasteries, and, until that time, tithes could belong only to the church; it was impossible, therefore, that there could be any ancient descent as to them; they could not descend from ancestor to heir, because they could not be in the hands of any private individual.

Doe v. Bishop of Landaff, 2 N. R. 491.¶

The gabel or rent issuing out of any gavelkind land shall ensue the nature of the land; for the Conqueror confirming the privileges relating to the land, doth confirm also the privileges relating to the tribute or rent, which are but the profits of it. Hence, since the rent descends in the same manner the land did, it follows that all rents issuing out of such lands shall descend in gavelkind. Nor is there any difference that can be well conceived between a rent-service and a rent-charge in this case; and it has been adjudged accordingly, that a rent-charge, granted out of gavelkind land, shall descend according to the rules of descent in that custom, because it is part of the profits of the land, and issues out of the land, and so shall submit to those rules which govern the land out of which it springs.

Mod. 96, 97, Randal v. Jenkins; Bro. tit. *Custom*, 58, *cont.*

For a condition broken, the heir at law shall enter, because the condition is a thing of new creation, and altogether collateral to the land, being not in any manner like the rent, which is part of the profits of the land itself. But, when the eldest son hath entered for the condition broken, the younger children shall enjoy the land with him; and the reason is, because the eldest son is in of the old estate, which is still under the control and direction of the custom.

Lamb. 608; Co. Lit. 11, 12. [*Infra*, tit. *Heir and Ancestor*, B. 2.]

[But we must distinguish between a condition in gross, and a condition incident to a reversion: for of the latter the special heir shall take advantage, though not of the former. A man made a lease of land, parcel borough-english, and parcel at common law, by indenture for twenty-one years. Provided, that if the lessor, his heirs or assigns, should give a year's warning to the lessee, that he, his heirs or assigns, would dwell there, then the lease should be avoided: the lessor died, leaving two sons; the eldest assigned over his part to the youngest; and the question was, whether the youngest son was such a person as could give warning; or, whether the condition was not gone by the severance of the reversion on the death of the father? Manwood and Monson, Justices, were of opinion, that he might give warning, and that the law which severed the reversion, has severed the condition also; and so for one part, as heir in borough-english, and for the other, as assignee of the elder brother, (by stat. 32 H. 8, c. 34,) he shall take advantage of the condition. But, if a man makes a feoffment in fee of borough-english lands on condition, and dies, having issue two sons, the eldest only shall take advantage of the condition, for it is a condition in gross; but in this case there was a reversion in the lessor.

Moore, 113; Godb. 2, S. C.

If a lease for years be made of two acres, one of the nature of borough-english, the other at common law, on condition, and the lessor die, leaving issue two sons, each of them shall enter for the condition broken; for by act of law a condition may be apportioned.

Co. Lit. 215. Mr. Robinson observes, that it is difficult to reconcile this passage

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with another in the same book; viz. That if a man seised of lands *ex parte matris*, makes a gift in tail or lease for life, the heir of the part of the mother shall have the reversion; and the rent also, as incident thereunto, shall pass with it; but the heir of the part of the mother shall not take advantage of a condition annexed to the same, because it is not incident to the reversion, nor can pass therewith. Co. Lit. 12 b. But as this is not warranted by the case cited as an authority for it by Lord Coke, Mr. Robinson adheres to the other opinion as more agreeable to common reason. Robins, Gav. 121.

Manwood, in Dy. 316 b, puts this case: A man seised in fee of land in gavelkind, has issue two sons, and by his last will devises the land to his eldest son, on condition that he pay to the wife of the devisor 100*l.* at a certain day; and he fails of payment; whether the younger may enter on a moiety on his brother, by a limitation implied in the estate? *Qu.* But this doubt is, as Lord Coke observes, well resolved by the following determination: A copyholder in fee of land descendible in borough-english, having three sons and a daughter, after a surrender to the use of his will, devises the land to his eldest son, paying to his daughter and each of his other sons 40*s.* within two years after his death: the eldest son is admitted, and does not pay the money; the youngest son enters on the land, and his entry was holden lawful; for though the word *paying* in case of a will may make a condition, yet here the law construes it a limitation, of which the youngest son in borough-english may take advantage; and it is the same as if he had devised the land to his eldest son till he made default in payment; for if it should have been a condition, then it would have descended to the eldest, and it would, consequently, have been at his pleasure whether his brothers or sister should be paid or not.

Rob. Gav. 121; Wellocke v. Hammond, 3 Co. 20; Cro. El. 204; 2 Leon. 114.

But, if a man, having three sons, devise gavelkind lands to his *second* son, paying, or upon condition to pay to each of his other sons 100*l.*, and the devisee fail of payment, Mr. Robinson thinks, that the youngest son cannot take advantage of this by entering into a third part, but in order to defeat the devise, the eldest son ought first to enter upon the whole; agreeably to the determination in the case of Curtis v. Woolverstone, Cro. Ja. 56, where a man having three sons and several daughters, devised lands descendible in borough-english to his *second* son in fee, on condition to pay 20*l.* to each of his daughters at their age of 21; and the devisee not paying the money at the time, the youngest son entered in his own name; such entry was holden ill; for this shall not be taken as a limitation, but as a condition, it differing from the reason of the case of Wellocke v. Hammond, where, had it been construed a condition, it had been void and to no purpose; but it shall be expounded according to the common law, where it is not necessary to give it a contrary exposition.

Rob. Gav. 122.]

Touching the manner of descent, it is first to male (*a*) children, then to the female, then to collateral relations; and the descent had, after the manner of the civil law, regard to the *stirpes*; and therefore, if the eldest son had issue a daughter, she should inherit her father's share with the younger sons.

Lit. § 210; Co. Lit. 140 a; Lamb. 608. (*a*)|| In this respect the custom agrees with the general rule of the common law, that a woman could never take part of an inheritance with a man; *mulie nunquam cum masculo partem capit in hæreditate aliquâ*. Glanv. lib. vii. ch. 3.]

As to warranty, and its manner of affecting heirs in gavelkind, the law stands thus:—If a man enfeoffs another of lands with warranty, and dies,

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leaving issue several sons, and lands in gavelkind to descend to them, the warranty shall descend only on the eldest son, as heir at common law; for *warranty* being a *covenant distinct from* and *collateral to* lands, it could not come under the character and denomination of privileges belonging to lands which the Conqueror confirmed, and therefore must be governed by the rules of the common law, which will carry it to the heirs at common law. However, in this case, if the feoffee is impleaded, he may vouch all the heirs in gavelkind, that he may have the full benefit of his warranty; and that their lands being subject to the warranty, they may be called in to the defence, that they may not lose their lands without being concerned in the defence against the opposite title. But in this case the feoffee may, if he pleases, vouch only the heir at common law, as the person on whom the warranty descends; so that it is left to his choice, either to vouch all the heirs by the custom, that he may recover in value from them all, or only to vouch the heir at common law.

Hob. 31; Co. Lit. 376 a, b.

But the great question is, in case all the heirs are vouched, and the heir at common law happens to have nothing at the time of the voucher, so that the recovery in value lies upon the younger brothers; who in such case shall deraign the warranty paramount, and recover the recompense in value? Some have been of opinion, that as they are vouched together, they shall all vouch over, and that the recompense in value shall enure according to the loss.

Co. Lit. 376, b.

Others have holden, that it is against the maxim in law, that they who are not heirs to the warranty should join in voucher, or take benefit of a warranty which did not descend to them; and therefore the heir at common law only, on whom the warranty descended, shall deraign it, and recover in value. But this is denied to be law on the other side; for by the rule of law, the vouchee shall never sue to have execution in value till execution is sued against him, and therefore he cannot have execution in value. They urge farther, it would be contrary to the rules of reason and equity, that the heir at common law should have all the benefit, while the special heirs sustain all the loss; and to strengthen this opinion, my Lord Coke adds, (a) that the reason given in the books, why the special heirs only should not be vouched, is, because if they only were vouched, they would lose the benefit of the warranty paramount; and therefore the heir at common law shall be called upon with the rest, that they may all deraign the warranty paramount; but *qu*.

Co. Lit. 376 b. (a) [And in the case of *Game v. Sims*, Lord Coke saith, that if the heir at common law be vouched for warranty, who vouches the heirs in gavelkind, because of the possession, they all shall vouch over, and what is recovered in value shall go only to the heirs in gavelkind. So, if two be vouched where one has nothing, and they vouch over, the recovery in value goes only to him who had the interest. *Cro. Ja.* 218. And of the same opinion, both as to heirs in gavelkind and borough-english, was Holt, C. J., in the case of *Page v. Hayward*, *Rob. Gav.* 131.]

The eldest son only is rebutted by the warranty; for a warranty being a covenant distinct from lands, the confirmation of the Conqueror, which related only to lands, and the privileges belonging to lands, could not extend to it; so that in its descent it must be directed by the rules of the common law, and go to the eldest son and bind him.

*Lamb.* 608; *Co. Lit.* 27 a; *Cro. Eliz.* 431; *Leon.* 112, pl. 154. But *qu*., for in the last of these books there is a case to this effect: *A formedon in descender* was brought by three sons, of lands in gavelkind, and the warranty of their ancestor was pleaded

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against them in bar; upon which they were at issue, if assets by descent; and it was found by special verdict, that the father of the demandants was seised in fee of lands in gavelkind, and devised them to the demandants, and to their heirs, equally to be divided among them; and the court was of opinion, that they were in as purchasers by the devise, and, consequently, that the lands were not assets; so that in this case the rebutter of all the sons, and not of the heir at law, was admitted.

[Three men levied a fine, with a warranty for the heirs of them all: the court doubted whether they should receive it, for that the warranty should be for the heirs of one in certain; but because the land was gavelkind, and the consors heirs by the custom, the court received it.

24 E. 3, 66 b; Fitzh. Fines, 113; Bro. Fines, 65.]

By the custom of gavelkind, a husband, after the decease of his wife, is to have a moiety of such gavelkind land whereof his wife had an estate of inheritance, whether he had issue by her or not, which he is to hold without committing waste, and the like, as in tenancy by the curtesy, as long as he continues unmarried.

Lamb. 615; Co. Lit. 30 a, 111 a; Rob. Gav. 135, &c.

Likewise the wife, by the same custom is to have, after the death of her husband, a moiety of his inheritance in gavelkind, to hold as long as she continues unmarried and chaste; the presumption (a) of her chastity to continue till she can be proved to have been delivered of a child got during her widowhood.

Cro. Eliz. 121; Lamb. 616; Leon. 133; Roll. Abr. 558. (a) [But authorities are not wanting to show that this presumption fails merely upon evidence of the commission of the act of fornication itself, though the detection of it be not made in this public manner. Rob. Gav. 165, and the authorities there produced.]

A woman cannot waive this dower, and claim her dower at common law; for where gavelkind is the *lex loci*, it must govern the property of the place; and all controversies concerning lands, where such law obtains, must be determined with a strict regard to the customs which are annexed to such law; for if such law and its customs are not made the rules to decide the differences by that arise within the precinct where they obtain, they are not the law there.

Savil, 91; Leon. 83.

Lambard is of opinion, that a *legal seisin* of lands in gavelkind in a husband will not entitle a wife to dower, as it will of an inheritance at common law, but that an *actual seisin* is required; and he founds his opinion on the words of the Kentish custom, which he hath placed in the latter end of his book; (a) the words are these, that a woman shall be endowed *des tenements dont son baron morust seise et vestu*; which word *vestu*, in his opinion, must mean an actual seisin; and, consequently, since customs derogatory from the common law must receive a severe construction, a wife will not be received to claim her dower in gavelkind, without such seisin of the husband.

Lamb. 618, 619. (a) [There is no case in the books to warrant this opinion of Mr. Lambard; and it is observable, that the word *vestu* is not in the edition of the book referred to, viz. the Customal, printed by Tottel; nor in a manuscript copy of that record, fairly written on vellum, amongst a collection of the old statutes in Lincoln's Inn library. But were Mr. Lambard's the right reading, it might, as Mr. Robinson observes, bear some doubt whether he has not put too strong an interpretation on this word; for an estate *vested* by no means imports that the tenant has a seisin in deed, but only that the estate is not in abeyance or contingency; and undoubtedly the estate *vests* in the heir at law immediately on the death of his ancestor, which is, before entry, called a seisin in law. But let the proper sense of this single word be what it will, it

(B) The particular Cases belonging to this Custom.

can scarcely be sufficient to add so unreasonable a qualification to the custom, as that the laches of the husband, in gaining an actual seisin by entry, shall prejudice the wife, without a strong usage accordingly. Rob. Gav. 171, 172.]

All gavelkind land is devisable, for the allodial property doth follow the rules of the civil law, which permits any person to make his will, and to dispose of his estate; and this notion the clergy seem to have brought over into all those allodial possessions, and the custom hath continued ever since.

Cro. Eliz. 561, 562; Rob. Gav. 234. But by the express words of the statute of frauds, 29 Car. 2, c. 3, § 5, the devise of these, as of other lands, must be in writing.

All the children shall join in a writ of attain, and in a writ of error touching the gavelkind lands; for since they have a joint title, they are to join in all actions for the recovery of their rights.

(B) The particular Cases which have been adjudged relating to this Custom.

IN dower brought by a husband and wife, the defendant pleads, that the land of which dower is demanded, is of the nature of gavelkind; and that the custom is, in land of such nature, to endow the wife of a moiety *tenendum quamdiu non maritata remanserit, et non aliter*; upon which the demandants demurred, and judgment was given against them, because the custom is well pleaded against the dower in the affirmative, with the negative *et non aliter*, and is confessed by the demurrer; and therefore the feme cannot be endowed contrary to the custom so expressly allowed.

Leon. 133, pl. 82.

If a man seised of lands in gavelkind give or devise them to a man and his eldest heirs, this does not alter the customary inheritance, or hinder the descent, according to the rules in gavelkind, for that can be only done by act of parliament.

Co. Lit. 27 a.

If lands in gavelkind descend to the king and his brother, the king shall take one moiety, and his brother the other; but if the king dies, his moiety shall descend to his eldest son, and not according to the rules of descent in gavelkind; for the king was seised of his moiety *jure coronæ*, therefore it shall attend the crown, and, consequently, go to the eldest son.

Plow. 205; Co. Lit. 15.

A, seised of lands in gavelkind, had issue three sons, and devised part to one, part to another, and other part to a third; and appointed by his will, that if any of them died without issue, that the other should be his heir; and it was adjudged, that each of them had an estate-tail by implication, by that part of the will, *that if any of them died without issue, the other, &c.*, and likewise that the word *heir* makes a fee-simple in that part that descends to the survivor, upon the death of the rest without issue.

Moore, 864, Spark v. Purnall.

A man seised of land in gavelkind makes a feoffment to the use of himself and his wife in tail, the remainder to his right heirs; the word *heirs* in the remainder is a word of limitation, and not of purchase; and therefore the remainder shall descend according to the custom of gavelkind.

Bro. tit. *Custom*, (1). [But where a trust of gavelkind lands is executory, and to be carried into execution by a court of equity, that court will direct the conveyance to be made according to the rules of the common law, and not according to the custom. Roberts v. Dixon, 1 Atk. 607. See Starkey v. Starkey, *infra*, tit. *Uses and Trusts* (H), S. P.]

(B) The particular Cases belonging to this Custom.

Lands in Kent were disgavelled (by 31 H. 8, c. 3, and a private act made 2 & 3 E. 6,) to all intents, constructions, and purposes whatsoever ; and that they should descend as lands at common law, any custom to the contrary notwithstanding ; and the question was, whether these lands lost by these statutes all their other qualities or customs belonging to gavelkind, as well as their partibility ; and resolved that they lose only their partibility.

Raym. 59, 76, 77 ; 1 Sid. 77, 135 ; Lev. 79 ; 2 Keb. 288 ; Hard. 325.

For first, these acts were made at the petition of those gentlemen whose lands were disgavelled, to prevent the extinction of their families by the frequent divisions of those lands ; therefore it is to be presumed, that the legislature intended only to destroy partibility, as that part of the custom which tended to the crumbling of families ; and not those other beneficial customs annexed to such lands in Kent, such as devising, forfeiture for treason only, &c.

2. To expound this private act of the 2 & 3 E. 6, literally in the clause, (*that they should be as lands at common law to all intents and purposes,*) would take away all manner of power of devising those lands ; for lands at common law were not devisable ; and this act being subsequent to 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5, of wills, must repeal them, and, consequently, prevent all future devises ; but this restraint cannot be intended to be within the view of the petitioners, nor of the legislature that framed the act upon the petition.

3. Though in the beginning of the clause the words *to all intents and purposes*, &c., are large, yet they are restrained by the last words of the clause, viz. : that they should descend as lands at common law, and, consequently, the custom of partibility is only destroyed ; moreover it is very much to be doubted, whether the power of devising, and the other qualities annexed to the partible lands in Kent, be essential to gavelkind ; for the custom of gavelkind prevails in other countries besides Kent ; and yet it may be very much questioned, whether the gavelkind of Kent, and that in other countries, agree in any thing but the manner of descent ; and if this doubt may be admitted, then those extraordinary customs in Kent cannot be extinguished by a statute, without particular words for that purpose.

Sid. 137 ; Raym. 59, 77.

To illustrate this point farther, it will be necessary to take notice, that it is sufficient for any one, who will entitle himself by the custom of gavelkind, to plead that the land is in Kent, and of the nature of gavelkind, without pleading the custom specially ; but, if any one will plead the custom of devising, or of having a moiety as tenant by the curtesy, or in dower, he must plead the custom specially, and not in that general manner he may plead gavelkind. And the reason of this difference seems to be this : That gavelkind in Kent is the general law of the place, and no particular custom ; and therefore when it is generally alleged, the court shall take notice of it as of a law that prevails in a considerable part of the kingdom ; but as for the other customs, they are not an essential part of the gavelkind, and so are not laid before a court upon a general pleading of gavelkind, but require a particular manner of pleading them, as all other private customs do which are derogatory to the laws of the kingdom, that the judges may be apprized of them, and where they obtain, and so give their decisions with regard to them.

Raym. 76 ; 1 Lev. 79 ; Sid. 138 ; Cro. Car. 562 ; 2 Sid. 153 ; Brown v. Brooks, Lamb. 595 ; Rob. Gav. 41 ; 2 Ld. Raym. 1292.



## Grants.

Heirs in gavelkind shall make partition as parceners, and a writ of partition lies between them as it does between parceners; and in the declaration upon such writ the custom must be mentioned; as to say, that the land is of the custom of gavelkind; but they need not prescribe; for though the custom, as different from the general law of the kingdom, must be taken notice of to the judges, yet there is no necessity of prescribing, because it is *lex loci*.

Co. Lit. 175 b; Lit. § 265.

[If a man has three sons, and purchases lands in gavelkind, and a younger son dies in the lifetime of the father, leaving issue a daughter, the daughter shall inherit the part of her father *jure representationis*; for the custom having made all the sons heirs, the law implies all the necessary incidents and consequences in point of descent. And the representative would in like manner be admitted, though the lands were not purchased till after the death of her father.

2 Ld. Raym. 1024; 1 Salk. 243; 1 P. Wms. 63; 6 Mod. 120.]

## GRANTS.

THE word *grant* is regularly applied to things incorporeal, such as advowsons, rents, commons, reversions, &c. which are therefore said to lie in grant, and not (*a*) in livery, because they cannot pass from one to another without (*b*) deed.

Co. Lit. 172 a; 332 a. [The legal import of the word "grant," and its operation in conveyances of estates in fee-simple, in gifts in tail, and in leases for lives and for years, is explained by Mr. Butler in his very learned note upon Co. Lit. 384 a.] β By the word *grant* in a treaty is meant not only a formal grant, but any concession, warrant, order or permission to survey, possess or settle, whether written or parole, express or presumed from possession. Such a grant may be made by law as well as by a patent pursuant to a law. 12 Pet. 410. See as to the meaning of the word *grant* in a deed, *Dudley v. Sumner*, 5 Mass. 472; *Livermore v. Bagley*, 3 Mass. 487; *Frost v. Raymond*, 2 Caines, R. 188; *Den v. Smith*, 1 Hayw. 251. (a) What thing lies in grant, and not in prescription, and *vice versa*, vide *Dav. 13*. (b) That a rent granted by one coparcener to another for equality of partition, is good without deed, because they do not claim from each other, but as making one heir to their ancestor. Co. Lit. 169 a.

|| But at common law the grant was only inchoate until the tenant had attorned; in other words, had consented to the grant. The statute of 4 & 5 Ann. c. 16, for the amendment of the law, having superseded the necessity of attornment, it would seem, notwithstanding the doctrine adverted to by Mr. Fearn to the contrary, that a grant by a person having an incorporeal hereditament, or having a reversion or remainder expectant on a particular estate, will immediately, and by its own operation, pass the freehold to the grantee.

Prest. Tr. Conv. 41; Fearn's Posth. 28.||

On this difference between things corporeal and incorporeal, it hath been holden, that there can be no discontinuance of things which lie in grant; and therefore if tenant in tail of a rent, advowson, common, or remainder,

## Grants.

or reversion *expectant* on a freehold, make a grant by deed or fine, or disseise the tenant of the land out of which the rent is issuing, whereof he is seised in tail, and make a feoffment with warranty, that these acts work no discontinuance of the entail, for nothing passes but during the life of tenant in tail, which is lawful.

Lit. § 627; Co. Lit. 327 b; 3 Co. 85; Leon. 111, and vide 2 And. 110.

Also, of things which may be transferred without the notoriety of livery and seisin, such as rents, advowsons, &c. which lie in grant, a man cannot by any disposition or act *in pais* forfeit them: and therefore, if a man seised of a rent, advowson, or common for life, grants them by deed to another in fee, this is no forfeiture; for this can be no way prejudicial to him in reversion, because, should the grantee claim an estate in fee, he can make no title without the original grant made to his grantor, by which it must appear what interest he had, and, consequently, what estate he could convey; and so the grantee, notwithstanding the grant in fee, can claim no larger estate than his grantor had power to make, and so he in reversion can receive no prejudice.

Co. Lit. 233 b; 8 Co. 45 a.

So, there can be no occupant of things which lie in grant (*a*), and which cannot pass without deed, as rents, &c., because these things having no natural existence, but consisting purely in the agreement, and depending on the institution of the society for their being, no man can enter to possess them. Besides, as these things are framed, and have their existence by the municipal laws of the nation; so those laws have established the solemnity of a deed to transfer them; whence it follows, that since no man can make himself a title to those things without deed, whoever claims them, must show he is a party to the deed before he can derive himself a title to the things contained in the deed.

Co. Lit. 41 b; 2 Roll. Abr. 150; Cro. Eliz. 721, 901; Vaugh. 199. (*a*) [That is, a general occupant; for according to Lord Coke, Co. Lit. 388, if *heirs* are named in the grant of a rent *pur autre vie*, they shall take. Dy. 186, in marg.; 1 Bulstr. 155; Mo. 623, 664; Goldb. 172.]

But for the better understanding of this head we shall consider,

(A) What Persons may make good grants: And herein,

1. *Of Grants by Corporations.*
2. *Of Grants by Ecclesiastical Persons.*
3. *Of Grants by Infants.*
4. *Of Grants by Feme Coverts.*
5. *Of Grants by Idiots and Persons of Insane Memory.*
6. *Of Grants by Persons under Duress.*

(B) What Persons may take by Grant.

(C) What Name or Description of the Grantor, or the Grantee, will make the Grant certain enough.

(D) Of what Interest in the Grantor he may dispose: And herein,

1. *Where by Reason of Maintenance a Thing cannot be granted or assigned over.*
2. *Where the Grantor must have the absolute Property, so that the Grant be not to the Prejudice of a third Person.*
3. *Whether a bare Right or Possibility may be granted or assigned over.*
4. *What Seisin or Possession in the Grantor will enable him to grant it over.*
5. *Where the Grantor's Right, being joined with a Trust or Confidence is incapable of being granted or assigned over.*

(A) What Persons may make good Grants.

(E) What Ceremony is requisite to the Perfection of a Grant: And herein of the Necessity of a Deed.

(F) What Words are sufficient to create a good Grant.

(G) Where a Thing shall be said to pass by Grant, or some other Conveyance.

(H) Where Grants shall be said to be good, or void, for Incertainty: And herein,  
1. *What shall be a sufficient Description of the Thing granted, notwithstanding any Misrecital thereof.*

2. *Where a Defect in the Description may be aided by Relation to a Thing certain.*

3. *Where, by an Election given to the Grantee, he may reduce an uncertain Grant to a Certainty.*

(I) How Grants are to be expounded: And herein,

1. *How to be construed where there appears a Repugnancy in the Words.*

2. *Where the Premises differ from the Habendum, and therein how far the Habendum may enlarge or abridge the Grant in the Premises.*

3. *How the Words of a Grant are to be construed as to the Things intended to be granted.*

4. *Where a Thing shall be said to pass as appendant, appurtenant, or incident.*

5. *What Estate or Interest shall be said to be granted.*

6. *At what Time the Thing granted becomes vested, and when the Grantee must take the same.*

(A) What Persons may make good Grants: And herein,

1. *Of Grants by Corporations.*

CORPORATIONS aggregate, although they be invisible, and exist only in supposition and intendment of law, yet are they capable of making grants and parting with their possessions.

But for this *vide tit. Corporations.*

But a dean, without the chapter; a mayor, without his commonalty; the master of a college, or hospital, without his fellows, cannot grant or make any contract that will bind the corporation.

21 E. 4, 12; Moore, 51; Perk. § 31, 32. *℥* A deed made by a corporation must be executed in the corporate name and under the corporate seal. *Lessee of Hatch v. Burr*, 1 Ohio, 394.

2. *Of Grants by Ecclesiastical Persons.*

The grants of all persons dead in law, as monks, friars, canons professed, and suchlike religious persons, were always holden void.

Perk. § 3.

But it seems that, by the common law, deans and chapters, masters and fellows of colleges, masters and brethren of hospitals, and suchlike corporations aggregate of many, might of themselves alone, without the consent or confirmation of any, have made long leases for lives or years, or gifts in tail, or estates in fee to others of their possessions, at their wills and pleasure.

Comp. Incumb. 415.

So, bishops, deans, &c., seised in the right of their bishopricks, deaneries, &c.; so archdeacons, prebendaries, parsons, vicars, &c., with the consent and confirmation of others, might grant their possessions in the same manner as other aggregate corporations.

Comp. Incumb. 415.

## (A) What Persons may make good Grants.

But now, by the statutes of 1 Eliz. c. 19, and 13 Eliz. c. 10, all gifts, grants, feoffments, or other conveyance by bishops, masters, and fellows of colleges, deans and chapters, &c., are void, except leases for the term of twenty-one years, or three lives, being made conformable to the rules prescribed by these statutes.

Vide these statutes and the explanation of them, tit. *Leases and Terms for Years*.

If a person obtains a grant to build houses on church or college land, and this is confirmed, (where confirmation is necessary;) this grant makes no alienation, but is only as a license or covenant; for the soil remains in the grantor, and so, by consequence, the houses are also in him.

Hetley, 57.

Ecclesiastical persons seised of advowsons in right of their churches, are restrained from alienating the same, or granting the next or other avoidance thereof, to the prejudice of their successors; for these are parcels of the possessions and hereditaments of the church, and not things whereof an annual rent or profit can be reserved.

7 Co. 7, Bedford's case, if made by a bishop, though confirmed by dean and chapter, are void.

But, though these grants are void against their successors and the king, yet the grant of a bishop, in such case, is good against himself, so that he cannot avoid it during the time that he continueth bishop, the statutes being made only for the benefit of the successors, that, by the preceding possessors, they might not be prejudiced in their respective rights; but not to restrain those in possession from doing any thing to bind themselves during their own time.

Cro. Eliz. 207, 440, 690; Ander. 241.

The like law in case of grants made by deans and chapters, for they are void when the dean (being principal member of the corporation) dies, and bind both dean and chapter during his life only.

3 Co. 60; Cro. Ja. 173.—The grant of the next avoidance by a chapter, not being made by the head of the corporation, is void immediately. Chapter of Southwell v. Bishop of Lincoln, 2 Mod. 56; 1 Mod. 204, S. C.

So, the grant of the next avoidance of an advowson is only void against the successor, but shall bind the bishop himself, &c. So, if an annuity be granted by a bishop out of the possession of the bishopric, this is not void (a) against the bishop that makes the grant thereof.

10 Co. 60; Keb. 182; Hard. 366. (a) So, if a bishop makes a lease for above twenty-one years, this shall bind the bishop during his time. 2 Leon. 138.—Or if a bishop lets tithes for three lives, which is a void lease against the successor, because there is not any remedy for the rent; yet it is not void against the bishop himself. Cro. Ja. 173.—So, where a bishop, by deed enrolled granted to the queen, without the consent of the dean and chapter; it was holden that this was not void against the bishop himself. Roll. Rep. 151.

So, if an (b) archdeacon, dean, prebendary, &c., make leases, or other grants of any of their sole possessions, not warranted by statute, they shall be bound by their own grants for the time.

Goulds. 138; Hetley, 24. (b) But, where there is a chapter that hath no dean, as the chapter of the collegiate church of Southwell, grants or leases made by them, contrary to the statute of 13 Eliz. c. 10, are void *ab initio*; for they must be either so, or good for ever. Mod. 204.—So, in all cases where a corporation aggregate makes a lease not warranted by the statute of 13 Eliz. c. 10, such lease is void *ab initio* against themselves; but where a sole corporation makes such lease, it shall bind him that makes it, but shall be void against his successors. Leon. 308; Hard. 326.

## (A) What Persons may make good Grants.

Where the master and fellows of a college by deed enrolled made a lease not warranted by the statute, and levied a fine, and five years passed without claim; in this case, though it was holden, that the lease was void against the succeeding master, yet it was good during the life of the master that was party to the lease, and made no claim, because he is the head and principal part of the corporation.

11 Co. 67; Roll. Rep. 151; Leon. 306.

## 3. Of Grants by Infants.

Infants in regard to their want of understanding are so far protected by the law, that (a) regularly all their grants are void in the same manner as their contracts are.

Vide head of *Infancy and Age*. (a) Where an infant may dispose of lands in gavelkind, vide tit. *Gavelkind, ante*.—That an infant coparcener shall be bound by partition, tit. *Coparceners*.—What acts he may do when executor, tit. *Executors and Administrators*. β Deeds executed by infants are voidable, so soon as their minority ceases. On coming of age they may affirm or signify their dissent. *White v. Flora and Cherry*, 2 Tenn. R. 426.γ

But herein the law distinguishes between such grants as are void, or only voidable; the first of which are all such gifts, grants, or deeds made by an infant, as do not take effect by delivery of his hand; as, if an infant give a horse, and do not deliver the horse with his hand, and the donee take the horse by force of the gift, the infant shall have an action of trespass, for the grant was merely void. (b)

Perk. § 12, 19. (b) || The doctrine of the Court of K. B. in the case of *Zouch v. Parsons*, 3 Burr. 1794, that a conveyance by lease and release was, under the circumstances which occurred in that case, voidable only, and not void, seems to be entirely exploded in practice; and the probability is, though the case itself has never been expressly over-ruled, that whenever the point shall require an explicit decision, it will be determined that such a conveyance by an infant cannot, under any circumstances of interest or no interest in the infant, or benefit or no benefit to him, be supported. 2 Prest. Tr. Conv. 248—250.||

But, if an infant enter into an obligation, make a feoffment, levy a fine, or suffer a recovery, these are not merely void, but only voidable by him.

Perk. § 12, 13.

If an infant being seised of a carve of land, grant a rent-charge to be issuing out of the same carve by deed, and the grantee distrain, he shall punish him as a trespasser, notwithstanding that the infant delivered the deed with his own hand.

Perk. § 13.

If an infant grant a rent by fine, this grant is voidable by himself during his nonage, by writ of error; but, if he do not avoid it during his nonage, it is good for ever. Also, if he die during his nonage, his heir shall not avoid it.

Perk. § 19; but for this vide head of *Fines and Recoveries, ante*.

An infant being lord of a copyhold manor may grant copyholds, for those estates have their force and effect from the custom of the manor by which they have been demised, and are demisable, time out of mind, without any regard to the person of the grantor.

Noy, 41; 4 Co. 23; 8 Co. 63.

## 4. Of Grants by Feme Coverts.

A grant by a feme covert is void; for no act of hers can transfer that interest which the intermarriage has vested in the husband. And there-

## (A) What Persons may make good Grants.

fore (a) if a man be seised of land in right of his wife, and his wife grant a rent issuing out of the same land, without the knowledge of the husband ; this grant is void ; and so it is notwithstanding that the husband had conusance of it, if it be made and delivered without his assent, or with his assent, if it be made in the name of the wife, and not in the name of the husband. And notwithstanding the husband be abroad out of the country at the time of such grant made and delivered, so that it is not known whether he be alive or dead ; yet such grant is void if the husband be living ; inasmuch as if the grantee, by force of such grant, enter into the land and distrain, the husband, at his return, shall have, for his entry and distress, an action of trespass.

Vide tit. *Baron and Feme*. (a) Perk. § 6. β In the United States generally, married women may convey their lands to purchasers by joining in the deed with their respective husbands, and acknowledging it according to the requisitions of the laws of the state where the land is located. For the form and requisites of the acknowledgment in the several states, see Bouv. L. D. *Acknowledgment*.γ

So, if there be a difference betwixt the husband and wife, by reason whereof certain lands of the husband are assigned unto the wife by the friends of the husband, and by his assent, and the wife grant a rent-charge to be issuing out of the same lands unto a stranger, the grant is void.

Perk. § 8.

If a single woman being seised of a carve of land, by deed grant a rent-charge thereout, and she deliver the deed to a stranger as an escrol, upon condition, that if the grantee go to Rome and return back before the feast of Easter then next following, that then he shall deliver the same escrol as her deed unto the grantee ; the woman marry, and before the feast of Easter, and during the coverture, the grantee go to Rome, and return again, and the stranger deliver the escrol unto him as the deed of the woman ; this grant is good, notwithstanding that the husband was seised of the land in the right of his wife, before that the grant took effect, for it shall have relation to the first delivery, at which time she was a feme sole.

Perk. § 9.

But in this case the grantee shall not have any rent by force of the said grant before the last delivery, when the same took effect as a complete deed.

Perk. § 10.

Also in such case, if the woman had been married at the time of the delivery of the deed as an escrol, and her husband died, and the grantee, after his death, had performed the condition, the grant had been void ; for the delivery of the deed as an escrol, being at a time when she was a feme covert, no subsequent act can make it good.

Perk. § 11.

## 5. Of Grants by Idiots and Persons of insane Memory.

For the learning on this head, see tit. IDIOTS AND LUNATICS, *infra*.

## 6. Of Grants by Persons under Duress.

The grants of persons under duress are void ; that is, if they were made under an apprehension of some bodily hurt, or if the grantor were imprisoned without cause, and the grantee refused to release or discharge him, unless he made such grant.

z Inst. 483. Vide tit. *Duress*.

## (B) What Persons may take by Grant.

But menacing to burn houses, or spoil or carry away the parties goods, is not sufficient to avoid the grant; for if he should suffer what he is threatened with, he may sue and recover damages in proportion to the injury done him.

4 Inst. 483; Perk. § 18.

## (B) What Persons may take by Grant.

THERE are few or no persons excluded from being grantees, and therefore a man attainted of felony, murder, or treason, may be a grantee. So, the king's villein, an alien, one outlawed in a personal action, or a bastard, may be grantees.

Perk. § 48.

A feme covert may be a grantee, and therefore if a rent-charge be granted to a feme covert, and the deed be delivered to her without the privity or knowledge of her husband, and the husband die before any disagreement made by him, and before any day of payment, the grant is good, and shall not be avoided by saying, that the husband did not agree, &c., but the disagreement of the husband ought to be shown.

Perk. § 43.

If an Englishman goes into France, and there becomes a monk, yet he is capable of taking by a grant made to him in England, because such profession is not triable; and also for that all such professions are taken away and declared unlawful, as being contrary to our established religion.

2 Roll. Abr. 43, said to be resolved by all the judges at Serjeants' Inn, 44 Eliz. in Ley's case.

Although (a) aggregate corporations are invisible and exist only in supposition of law, yet are they capable of taking by grant, for the benefit of the members of the corporation.

Co. Lit. 9; Saund. 344; 2 Lev. 246. (a) So, churchwardens may take goods for the benefit of the church. Roll. Abr. 393; March 66.—But not lands. 12 H. 7, 27; Kelw. 32 a; Co. Lit. 3 a; Salk. 167, pl. 7.—Except in London, where the parson and churchwardens are a corporation, and may purchase and demise lands, &c. Cro. Ja. 532; March, 66; Lane, 21; 5 Mod. 395. So in other places by act of parliament; as by st. 9 G. c. 7.

As, where the mayor and commonalty of N. brought an action of covenant against the mayor, bailiffs, and commonalty of Derby, and declared, that the defendants' predecessors had by their deed granted to the plaintiffs' predecessors, that all the commonalty of N. should be discharged of murage, pontage, custom, and toll, for all their merchandise, &c., within the vill of Derby, and that the officers of Derby had taken toll and custom of the burgesses of N. against the covenant; it was holden that the action lay, and that the grant to the corporation for the benefit of the particular members was good.

48 E. 3, 17; Saund. 344, cited.

If a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many persons capable to purchase, they have a fee simple without the word *successors*, because in judgment of law they never die.

Co. Lit. 94 b.

So, if a lease be made to them during their lives; this is equal to a grant made to them while they continue a body politic, which, by reason of the

(C) What Name, &c. will make the Grant certain.

perpetual succession of its members, is in law looked upon to be for ever.

21 E. 4, 76; Roll. Abr. 843.

If A grants to the mayor and burgesses of D, the moiety of a yard-land in the waste of ———, without describing in what part it should be, or how it is bounded, the corporation cannot make their election by attorney, but are first to resolve on having the land, and then they may make a special warrant of attorney, reciting the grant to them, and in which part of the waste the grant should take effect, and according to such direction the attorney is to enter.

Leon. 30.

{ A grant cannot be made to the surveyors of the highways and *their successors* for the benefit of the parish of B; they not being a corporation. But where an enclosure act authorized commissioners to divide and allot certain lands, and declared that the allotments should for ever remain for the benefit of the appointees, an allotment to the surveyors of the highways in the manner above-mentioned was held to be good; as the surveyors for the time being did not take by way of grant, but by way of a parliamentary declaration designating the persons who should be entitled to the allotments. That which was done by the commissioners under the directions of the act was the same as if their award had been set forth in it, and specifically enacted.

8 East, 38, *Johnson v. Hodgson*. }

(C) What Name or Description of the Grantor or Grantee will make the Grant certain enough.

THE names of persons at this day are only sounds for distinction-sake, though it is probable they originally imported something more, as some natural qualities, features, or relations; but now there is no other use of them, but to mark out the families or individuals we speak of, and to distinguish them from all others; and therefore in grants, which are to receive the most benign interpretation, and most against the grantor, if there be sufficient shown to ascertain the grantor and grantee, and to distinguish them from all others, the grant will be good.

Perk. § 36; Goulds. 122; Hob. 32. β Doubtful words in a deed poll are taken most strongly against the grantor. *Adams v. Frothingham*, 3 Mass. 352; *Worthington v. Hylyer*, 4 Mass. 205; *Watson v. Boylston*, 5 Mass. 411. γ

β It is essential to the validity of a grant, that the parties be named in the deed, or plainly designated so as to distinguish them from all others.

*Hall v. Leonard*, 1 Pick. 30. γ

And this we may observe in those cases, where there are such sufficient marks of distinction, that the grant would be good without any name at all; consequently, a mistake in the name of baptism or surname, is to be looked upon but as surplusage, and will not vitiate; as a (a) grant by or to *George*, Bishop of Norwich, where his name is *John*; or to *Henry*, Earl of Pembroke, where his name is *Robert*, is good, for there cannot be more persons of those names.

Co. Lit. 3; 2 Roll. Abr. 43. (a) But in pleading in these cases, the Christian name ought to be shown, for the death of the individual is a good plea in abatement, which often falls out, where the same office, dignity, or relation, continue in another. Co. Lit. 3.

So, a grant of an annuity by an abbot, by the name of the foundation,



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without his name of baptism, is good, if there be not any more abbots in England of the same name of foundation.

Perk. § 36; 2 Roll. Abr. 44.

If a grant be made to a man and his wife, without naming her by the name of baptism, yet she shall take.

46 E. 3, 22 b; 2 Roll. Abr. 43, cited.

β A grant by the state to A B and five others, as patentees, for and in behalf of themselves and their associates, the freeholders and inhabitants of the town of Hampstead, is a valid grant.

North Hampstead v. Hampstead, 2 Wend. 109.γ

So, if a grant be made to T and *Ellen* his wife, where in truth her name is *Emlyn*, yet the grant is good; for being called the wife of T reduces it to a sufficient certainty.

2 H. 4, 25; 2 Roll. Abr. 43; Co. Lit. 3.

If A be created a herald, and in the patent he be called *Chester*, a grant or obligation made to him by the name of *Chester* is good; for this sufficiently distinguishes him from all other men.

2 Roll. Abr. 44.

If there be father and son of the same name, and the father grant an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son being of the same name with his father, grant an annuity without any addition, yet the grant is good; for he cannot deny his own deed.

Perk. § 37; 13 H. 4, 4.

β Where a deed is executed to a person named therein, and described as of a certain town; and it is shown that there are two persons of that name, father and son, residing in such town, this is a case of latent ambiguity, and parol evidence is admissible to show which of the two was intended as the grantee: for example, where a deed was executed to E W, of P, and it appeared that there were at that time two persons named E W, the father and the son, residing in P, the father being called simply E W, and the son E W, junior; parol evidence was admitted to show that the negotiation was with the son, that the deed was intended for him, and that it was delivered to him. Held, that the title was transferred by such deed to the son.

Coit v. Starkweather, 8 Conn. 289.γ

A (a) bastard, who is known to be the son of such a one, may purchase, or be a grantee by such reputed name; for all surnames were originally acquired by reputation.

Co. Lit. 3; 2 Roll. Abr. 43, 44. (a) So, a woman, who hath gotten the reputation of being the wife of such a one, may be a grantee by that name, though in truth she was never married to him. Hob. 32.

As, where *George Shelly* conveyed lands to the use of himself, the remainder to *George Shelly* his son, whereas in truth *George* was born of one B in matrimony of one C, yet was reputed the son of *George*, and educated by him; though the boy was but six years old, it was ruled he should take the remainder; for having gotten by reputation the name of *George Shelly*, these words are a certain description of the person to take the remainder.

Co. Lit. 3. β When the grantee in a deed is called not by his true name, but by one acquired by reputation, the deed is valid. Society for the Prop. of Gosp. v. Young, 2 N. H. Rep. 210.γ

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But, if a remainder be limited to the eldest *issue* of J S, whether legitimate or illegitimate, and J S have issue a bastard, he shall not take this remainder; for it is not vested in J S, as it was in the other case, but is in contingency, and the certain time is not defined when this contingency shall happen; for the bastard, at his birth, does not acquire the reputation of being the issue of J S, and since the bastard, when first in being, cannot take by virtue of this limitation, he can never take it; for he cannot be understood to be the person designed and marked out by these words, if after his birth it depends on the uncertainty of popular reputation, whether he should take the remainder or not; and such a designation of the person as contains no certainty in itself, or no relation to any other certain matter that may reduce it to a certainty, is a void limitation.

2 Roll. Abr. 43, 44, *Blodwell v. Edwards*. [See Mr. Hargrave's note upon these cases in Co. Lit. 3 b.]

But, where a remainder is limited to the eldest *son* of *Jane S.*, whether legitimate or illegitimate, and she hath issue a bastard, he shall take this remainder, because he acquires the denomination of her issue by being born of her body, and so it never was uncertain who was designated by this remainder.

Noy, 35.

If a grant be made to a father and his son, he having but one son, the grant is good for the apparent certainty of it; but, if the father have several sons, or if a grant be made to a man's cousin or friend, these are void for uncertainty.

Cro. Ja. 374; Co. Copyh. 95.

It seems by the better opinion of the books, that a mistake of the Christian name will vitiate the grant; as, where the grant is without any Christian name at all, or where (a) a wrong name is made use of, as *Edmund* for *Edward*; neither can the party be declared against by his right name, with an averment that he made the deed by a wrong name, for that would be to set up an averment contrary to the deed, and contrary to that sanction allowed by law to every solemn contract; and therefore if he be impleaded by the name in the deed, he may plead that he is another person, and that it is not his deed.\*

Vide 36 H. 6. 26; Dyer, 279; Owen, 107; Co. Lit. 3; Cro. Ja. 558, 640; Perk. § 38. (a) But if J S reciting by his deed, that his name is J S, by the same deed grants an annuity by the name of Tho. S, this is a good grant; for the writ shall be brought upon the whole deed. Perk. § 40.—So, if A, reciting by her deed, that she is a feme covert, and in truth she is a feme sole, grants an annuity, &c., it is a good grant; for whenever there is a sufficient expression and signification of the party's intent, whatever is redundant and over and above, like all other surplusage, though mistaken, cannot hurt and destroy the force of the grant, according to the rule, *utile per inutile non vitiatur*. Perk. § 40.—So, if J S, knight, reciting by his deed that he is a yeoman, grants an annuity, the grant is good. Perk. § 40.—But, if a feme covert, reciting by her deed that she is a single woman, grants an annuity; this recital shall not bind her, or deprive her of her privilege of coverture. Perk. § 41. \**Sed qu.* the law? Few grants are without valuable consideration, and grants are to be construed most strongly against the grantors, for the benefit of the grantees; and it would be strange if the grantor, by his own fraudulent mistake, should avoid his grant. Nor do I see any reason why he should not be declared against by the name specified in his grant, and that grant be evidence that he is as well known by one name as the other. And vide *infra*.

But a mistake in a surname does not vitiate the grant, because there is no

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repugnancy that a person should have two different surnames, so that he may be impleaded by the name in the deed, and his real name brought in by an *alias*, and then he cannot deny the name in the deed, because he is stopped to say any thing contrary to his own deed.

3 H. 6, 25; 2 Roll. Abr. 146.  $\beta$  An error in the name of a party in a grant being entirely different in the habendum and tenendum from that of the previous part of the grant, shall not vitiate. This may be explained by referring to the survey, or entry in the public office. Helm v. Handley, 1 Lit. 219; Swan v. Wilson, 1 Marsh. 100. $\gamma$

Also, though a person cannot have two Christian names at one and the same time, yet he may, according to the institutions of the church, receive one name at his baptism, and another at his confirmation, and a grant made to or by him, by the name of confirmation, will be good; for though our religion allows no rebaptizing to make double names, yet it does not force men to abide by the names given them by their godfathers, when they come themselves to make profession of their religion.

46 E. 3, 22 b; Co. Lit. 3; 2 Roll. Abr. 43; Brownl. 147; Lit. Rep. 182.

So, if a man make a lease by a contrary name to that by which he was baptized, yet the lease is good; for this does not take effect (*a*) altogether by the indenture, but partly by the demise; as, if Joan by the name of Jane lease lands, admitting that these are distinct names (*b*), yet the lease is good.

2 Roll. Abr. 42, Hidd v. Chalonor. (*a*) So, of things which pass by livery, if the deed of feoffment be made by a contrary name of baptism of the feoffor or feoffee; yet is the feoffment good if livery and seisin be made, for it takes effect by the livery, and not by the deed. Perk. § 42.—So, if a man delivers a horse by word, and by contrary name of baptism makes a gift of him in writing: yet the gift is good by word, though not by the writing. Perk. § 42. (*b*) || In the report of this case by Leonard and Croke, it is said by Wray, that it had been adjudged in this court *upon good advice and conference with grammarians*, that Joan and Jane are but one name; and that the difficulty, which it required this learned conference to solve, had been raised by the fastidious delicacy of the ladies, who, *because Joan seemed to them a homely name, would not be called Joan, but Jane*. 1 Leon. 146; Cr. El. 176.||

If a rent be granted to J S or J D, the grant is void for (*c*) uncertainty, for the deed is in the disjunctive; and though the deed be delivered to J S, yet this cannot make the grant good; for the deed was void at first, and cannot be made good by the delivery.

Perk. § 56. (*c*) If J S hath issue two sons, and a grant is made to the first son of J S, without name; this is certain enough. Perk. § 54; Hob. 32.—But if J S hath not any issue, and a rent is granted unto him who shall be the first issue of J S, whether it be son or daughter; this grant is void for uncertainty. Perk. § 54.

If a rent, or any thing else that lies in grant, be granted to the right heirs of J S, and J S be alive, this grant is void; for there is no person (*d*) capable of taking, as answering this description.

Perk. § 52.  $\beta$  A grant of land to the heirs of A L, who is then living, is void for uncertainty. Hall v. Leonard, 1 Pick. 30. But a grant to the heirs of J S, who is then dead leaving heirs, may be good although the grantees are not otherwise identified. Finley v. Humble, 1 Marsh. 293. $\gamma$  (*d*) A grant to the Bishop of L and his successors, when there is no bishop in being at the time; or to the dean and chapter of St. Paul's, or to the mayor and commonalty of such a place, when there is no dean or mayor living at the time of the grant, is void. Vaugh. 199.

But, if a rent, &c. be granted to A for life, remainder to the right heirs of B, and B be dead at the time the grant is to take effect; this is a good grant.

But for this vide head of *Remainder and Reversion*.

$\beta$  An indenture was made between A and B, of the one part, and “the

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school-house and its employers," (describing the location of the school-house,) it was witnessed that the said A and B "in consideration of the natural love and affection which they have and bear unto the said schoolhouse and its congregation and employers thereof, have given, granted, aliened, enfeoffed, and confirmed, &c. unto the said schoolhouse and congregation, all that messuage, &c., habendum, unto the said schoolhouse and congregation thereof, or employers, to the only proper use of a schoolhouse for ever." Held, that this deed did not pass the legal title, because there was no party to receive it, and no valuable consideration to make it a bargain and sale, but that it operated as a declaration of trusts, and that the legal estate descended to the eldest son of the grantor.

Morrison v. Beirer, 2 Watts & S. 81.*f*

{John Lealand surrendered a copyhold in the occupation of him, John Lealand, to the use of Joseph Lealand and John Lealand his son for their lives and the life of the survivor, remainder to the heirs of the body of the said John Lealand son of Joseph Lealand, remainder to the right heirs of the said John Lealand. The surrenderor is the person last described; for the surrenderee is always before described with the addition of the son of Joseph; and on the other construction, there would be a useless circuitry of expression, in first giving the surrenderee an estate tail, and then immediately afterwards a fee. And if it was doubtful who was meant, the ultimate remainder would continue in the surrenderor.

9 East, 405, Roe v. Foster.}

It has been already observed, that the naming of the right names of the grantor and grantee is for no other purpose but to ascertain the parties and distinguish them from others; and that if there be a sufficient verification to this purpose, the grant will receive the most favourable interpretation; and it seems the same indulgence will be allowed of in the mistake of additions, which are by law made part of the name. By additions we mean names of dignity, which are marks of distinction, imposed by public authority, and always make up the very name of the person to whom they are given. And these are of two sorts—1st, Such as exclude the surname, so that the persons may not seem to be of any common family; and such are the names of earls, dukes, &c. 2dly, Such marks of distinction as are also imposed by the king, and parcel of the name itself, but do not exclude the surname, such as knight and baronet.

2 Inst. 666; Dyer, 88; Show. 392.

As to those names of dignity which exclude the surname, we have already observed, that in grants a mistake in the Christian name will not vitiate the grant, because there cannot regularly be more than one person of that name.

Co. Lit. 3.

So, a grant to a duke's eldest son, by the name of a *marquis*, or to the eldest son of a *marquis*, by the name of an earl, &c., is good, because of the common courtesy of England, and their places in heraldry.

Carth. 440; Ld. Raym. 292.

So, where a conveyance was made of a reversion to Ralph Evers, knight, Lord Evers, and he brought an action of covenant, to which the defendant pleaded, that at the time of the grant he was not *cognitus et reputatus per nomen mil.*, it was holden to be no good plea; for the person is sufficiently

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expressed by Lord Evers, and the addition of knight, though false, doth not take away the description of the true person.

Lord Evers v. Strickland, Bulstr. 21; Cro. Car. 240, S. C.

But it was adjudged in C. B., and affirmed by three judges in B. R., where the party set forth his title to an advowson by virtue of letters patent granted to A, *tunc armigero et postea militi*; and upon *oyer* of the letters patent it appeared, that the grant was made to A, knight, that it could not be intended the same person, because knight is a name of dignity, but armiger or esquire, a name of worship; and if he is afterwards made a knight, the name of esquire is thereby extinguished, and, consequently, that a grant made by the king to A, knight, when there was no such man a knight, was a void grant.

Carth. 440; Skin. 651; The King v. Bishop of Chester, 5 Mod. 297; 2 Salk. 560; 1 Ld. Raym. 335, S. C., and vide Lit. Rep. 200, S. P.—But Rokesby, J., held, that he might take by a grant made unto him by the name of knight, *et sic vice versâ, si constat de personâ, ut res magis valeat, &c.*—And note, this judgment was reversed in parliament, because it was only a mistake in the pleader, the party being in truth a knight at the time of the grant. Carth. 441; Show. P. C. 224; 12 Mod. 187.

β Two persons are jointenants of a fee-tail or fee-simple, each capable alone of making a grant of his moiety, one of them makes a deed, and the other is introduced in the close of the deed as relinquishing his right in the estate, without being joined in the deed in any other manner, and both execute the deed, it will be the deed of both.

Lithgow v. Kavenagh, 9 Mass. 161.

Persons to whom a grant is made to the use of a church, which at the time of the grant is not incorporated as such, stand seised to the use; and when the church afterwards acquires a legal capacity to take and hold real estate, the statute executes the possession to the uses, and the estate vests.

Dutch church of Schenectady v. Veeder, 4 Wend. 494.

At common law, a grant to a deceased person will pass no estate to his heirs.

Dougherty's heirs v. Edmiston, 1 Cooke, 134.

As to grants by and to corporations, the reader is referred to tit. CORPORATIONS (C. 2.)

(D) Of what Interest in the Grantor he may dispose: And herein,

1. *Where by Reason of Maintenance a Thing cannot be granted or assigned over.*

THE common law hath so utter an abhorrence to any act that may promote maintenance, that regularly it will not suffer a possibility, right of entry, or thing in action, or cause of suit, or title for a condition broken, to be granted or assigned over.

21 E. 4, 24; Co. Lit. 214; 1 Roll. Abr. 376; 2 Roll. Abr. 45; and Skin. 6, pl. 7, 26, pl. 1, that arrarages of rent are not assignable.—[See Mr. Justice Buller's comment upon the doctrine of maintenance in 4 T. Rep. 340, and see the cases on this head in tit. *Assignment*. See also tit. *Maintenance*, *infra*; and Wallis v. Duke of Portland, 3 Ves. 494.] β The following abstract of the law on this subject is copied from Bouv. L. D. *Buying of Titles*. When a deed is made by one who, though having a legal right to land, is at the time of the conveyance disseised, as a general rule, the sale is void; the law will not permit any person to sell a quarrel, or as it is commonly termed, a pretended title. Such a conveyance is an offence at common law, and by a statute of Hen. VIII. This rule has been generally adopted in the United States, and is affirmed by express statute. In some of the states, it has been modified or abolished. It has been recognised in Massachusetts and Indiana. 1 Ind. R. 127. In Massachusetts, there is no statute on the subject. but the act has always

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been unlawful. 5 Pick. R. 356. In Connecticut the seller and the buyer forfeit, each one half the value of the land. 4 Conn. 575. In New York, a person disseised cannot convey, except by way of mortgage. But the statute does not apply to judicial sales. 6 Wend. 224; see 4 Wend. 474; 2 Johns. Cas. 58; 3 Cow. 89; 5 Wend. 532; 5 Cow. 74; 13 Johns. 466; 8 Wend. 629; 7 Wend. 53, 152; 11 Wend. 442; 13 Johns. 289. In North Carolina and South Carolina, a conveyance by a disseisee is illegal; the seller forfeits the land, and the buyer its value. In Kentucky such sale is void. 1 Dana, R. 566. But when the deeds were made since the passage of the statute of 1798, the grantee might, under that act, sue for land conveyed to him, which was adversely possessed by another, as the grantor might have done before. The statute rendered transfers valid to pass the title. 2 Lit. 393; 1 Wheat. 292; 2 Lit. 225; 3 Dana, 309. The statute of 1824, "to revive and amend the champerty and maintenance law," forbids the buying of titles where there is an adverse possession. See 3 J. J. Marsh. 549; 2 Dana, 374; 6 J. J. Marsh. 490, 584. In Ohio, the purchase of land from one against whom a suit is pending for it, is void, except against himself, if he prevails. Walk. Intr. 297, 351, 352. In Pennsylvania, 2 Watts, R. 272; Illinois, Ill. Rev. L. 130; Missouri, Misso. St. 119, a deed is valid, though there be an adverse possession. 2 Hill. Ab. c. 33, § 42 to 52. The Roman law forbade the sale of a right or thing in litigation. Code, 8, 37, 2.g

2. *Where the Grantor must have the absolute Property, so that the Grant be not to the Prejudice of a third Person.*

It is laid down as a general rule, that a man cannot grant or charge that which he hath not; and therefore if a man grant a rent-charge (a) out of the manor of Dale, and in truth he hath not any thing in the manor of Dale, and afterwards he purchase the manor of Dale, yet he shall hold it discharged.

Perk. § 65. (a) But, where a man having debauched a young woman, and intending afterwards to put a trick on her, made a settlement on her of 30l. a year for life, out of an estate he had nothing to do with; yet the Court of Exchequer decreed him to make it good out of an estate he had of his own. Abr. Eq. 87.

A corody uncertain cannot be granted over, because of the prejudice that may accrue thereby to the original grantor; but a corody certain may.

11 E. 4, 43; 2 Roll. Abr. 45.

So, a common *sans* number in fee may be granted over, but a common for (b) life or years *sans* number cannot be granted over, because of the prejudice it may be to the tenant of the land.\*

21 E. 4, 84; 2 Roll. Abr. 46. (b) That a lessee at will cannot grant over his term. 22 E. 4, 6; 2 Roll. Abr. 46.—\*Sed. qd.

If the king grant a warren to J S and his heirs in his manor, the grantee may grant the manor with the warren over to another in fee, because this liberty *inheret solo et solum sequitur*.

2 Roll. Abr. 46.

So, if the king grant to another and his heirs, a fair or market in certain manors or vills, the grantee may grant over the manors or vills, with the fair or market. *Dubitatur*.

2 Roll. Abr. 46.

If a rent be granted in tail, the grantee cannot grant it over while it continues a rent, because, as such, it may be entailed within the statute *de donis*. But, if the grantee bring his writ of annuity, it is no longer within the statute, because then it is become a charge merely personal, without any relation to the land out of which it was at first granted, and therefore is become a fee simple conditional, as such a gift of lands had been before the statute; and therefore the annuity not being within the statute may be aliened or granted over.

Poph. 87; Co. Lit. 19 a; 7 Co. 61, Nevill's case.

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The grantee of a rent-charge in fee may grant over any part of it; though it hath been objected to these kind of grants or divisions of rent-charges, that thereby the tenant is exposed to several suits and distresses for a thing, which in its original creation was entire and recoverable upon one avowry. But the answer to this is, that it is the tenant's own choice, whether he will submit himself to that inconvenience, or not, because the grantee, before the 4 & 5 Ann. c. 16, § 9, could not take any benefit of the grant by distress, without the consent or attornment of the tenant; nor by assize, without he obtains seisin of it from the tenant. Besides, since the law allowed of such sort of grants, and thereby established such sort of property, it would have been unreasonable and severe to hinder the proprietor to make a proper distribution of it for the promotion of his children, or to provide for the contingencies of his family which were in his view.

9 H. 6, 13; 2 Roll. Abr. 45; Co. Lit. 148 a. He may clearly devise part, for that enures without attornment. *Ards v. Watkin*, Cro. El. 637, 651.

### 3. *Where a bare Right or Possibility may be granted or assigned over.*

If there be a devise of a term to A for life, remainder to B, B cannot in the lifetime of A, assign or grant over his interest, because he has but a bare possibility, for A may outlive the number of years.

Dyer, 116; 4 Co. 66; 10 Co. 47 b; Raym. 146; Sid. 188, and vide Chan. Cases, 8, 11, where it is said, that the trust of a possibility in the remainder of a term is disposable over, but the possibility in interest in the reversion of a term is not assignable, and vide 2 Vern. 563, and tit. *Assignment*.

If a lease be made to baron and feme for their lives, the remainder to the executors of the survivor of them; the husband cannot grant over the term, being but a possibility; for it is uncertain which of them shall be the survivor.

Co. Lit. 46; 2 Roll. Abr. 48; 10 Co. 51 a. So, if one devise a term to baron and feme for one-and-twenty years, remainder to the survivor of them; neither baron nor feme, during their joint lives, may grant this remainder over. Raym. 146.—  
|| If the husband sell the term, and survive the wife, he shall have the term against his own grant. *Per Popham, C. J.*, Poph. 5. He can neither release, grant, nor surrender, though, by Popham, perhaps a feoffment by the husband might destroy the possibility. Cro. Eliz. 580.||

If a church is void, the void turn is not grantable by any common person, for it is a mere spiritual thing, and annexed to the person of him who is patron; and, during the time of the vacation, it is a thing in right, power, and authority; a thing in action, and, in effect, the fruit and execution of the advowson, and the advowson itself. But (a) whilst a church is void, the next avoidance or avoidances that shall happen, or the inheritance of the advowson, may be granted away.

Dyer, 129 b, 282; Leon. 167; Cro. Eliz. 173; And. 15. (a) Owen, 131.

If a man acknowledges a statute in 2000*l.* to A, and afterwards leases the land for twenty-one years to another, and afterwards leases the same lands to another for ninety years, to commence immediately, and the land is extended upon the statute, at 53*l.* *per ann.*; the lessee for ninety years may, during the extent, grant over the term, although the extent be till the damages and costs are levied, which may not happen till after the expiration of the ninety years; for the extent is but in nature of a lease, and, by a reasonable construction, will end before the term of ninety years.

2 Roll. Abr. 48, Cadee and Oliver. *Dubitatur*. Cro. El. 152, S. C., *adjournatur*.

If a man grant a rent-charge with a clause of distress, and that if the

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distress be replevied, that the grantee may enter and hold till satisfaction, the grantee may grant over the rent with this penalty, although the penalty is but a possibility; for being annexed to the rent, it may well pass together with the rent.

Haverhill v. Hare, 2 Roll. Abr. 48, 49; Cro. Ja. 510, S. C.; 2 R. Rep. 12, S. C.; Poph. 126, 147, S. C.

If a man make a lease to B for forty years, and the lessor covenant that, upon his being allowed to view the premises, and finding them in sufficient repair at the expiration of the forty years, the lessee shall hold them for forty years longer; and the lessee, during the first forty years, grant to J S *totum interesse, terminum et terminos quos tunc habuit in tenementis illis*; this being but a mere possibility, cannot be granted or assigned over.

Moore, 27, Skerne's case, by three judges against one.

If a man grants 200 fagots of wood to be taken out of all his lands, or 20s. in lieu thereof, out of his said lands, with a clause of distress, at the election of the grantee to have the one or the other; in this case the grantee may, without any election, grant over the fagots, because he had a present interest in them; but the 20s. being given in lieu thereof, cannot be granted over before election.

2 Roll. Abr. 47, Southwell and Wade, adjudged.

If a man seised of divers woods bargains and sells 300 cords of wood to B and his assigns, to be taken by the appointment of the bargainor; by this bargain and sale a present interest is vested in B, which he may grant over before any appointment by the bargainor.

Moore, 691, Maynard and Basset, adjudged; 2 Roll. Abr. 47, and 5 Co. 24 b, S. C. cited. || Cro. Eliz. 819, S. C.; Noy, 32, S. C.—Goldsb. 184, says, that it is not grantable over; for no property vested before assignment; and if the grantee die before assignment, the grant is void, and his executors shall not have it.||

A man may grant that which he hath *potentially*, though not *actually*; as, if a lessor covenants that it shall be lawful for the lessee, at the expiration of the lease, to carry away the corn growing on the premises; although, by possibility, there may be no corn growing at the expiration of the lease, yet the grant is good, for the grantor had such a power in him, and the property shall pass as soon as the corn is extant.

Hob. 132, Grantham v. Hawley, adjudged; 2 Roll. Abr. 47, 48, S. C. cited.

So, if A leases land to B for years, and grants that he shall have the natural fruit of the soil, as grass, which renews yearly, which shall be on the land at the end of the term; this grant is good, and passes the property to the grantee.

Hob. 132; 2 Roll. Abr. 48.

So, a parson may grant to another all the tithe wool which he shall have such a year, and the grant is good in its creation, though it may happen that he had no tithe wool that year.

Hob. 132; 2 Roll. Abr. 48.

But a man cannot grant all the wool that shall grow upon his sheep that he shall buy afterwards; for there he hath it not either actually or potentially.

Hob. 132; 2 Roll. Abr. 48.

4. *What Seisin or Possession in the Grantor will enable him to grant it over.*

The grantee of a common may grant it over before he hath any seisin



(E) What Ceremony requisite to Perfection of a Grant.

thereof by the mouths of his cattle, for the freehold is in him by the grant.

36 Ass. 3 ; 2 Roll. Abr. 47, S. C.

So, the grantee of an advowson may grant it over before he has presented to it ; for he can have no seisin of it before it becomes void, and by the grant itself he is seised of the freehold, which he may grant over.

36 Ass. 3 ; 2 Roll. Abr. 47, S. C.

So, the grantee of a rent may grant it over before any seisin of the rent.

2 Roll. Abr. 47.

If a common be granted to husband and wife, and to the heirs of the husband ; after the death of the husband, his heir may grant over the remainder, for the estate was vested in him.

2 Roll. Abr. 47.

Lessee for years may, before entry, grant or assign over his interest to another ; for the lessor having done all that is required on his part to divest himself of the possession, and pass it over to the lessee, hath thereby transferred such an interest to the lessee, as he may at any time reduce into possession by an actual entry, as well after the death of the lessor as before, and such an interest as will go to his executors, and, consequently, may be granted or assigned over before entry.

Co. Lit. 46 b.

If A makes a lease of lands to B for life, remainder to his executors for years ; in this case the term vests in B so that he can grant it over ; for as an heir represents his ancestor as to an inheritance, so an executor represents his testator as to a chattel.

Co. Lit. 54 ; 2 Roll. Abr. 47.

5. *Where the Grantor's Right, being joined with a Trust or Confidence, is incapable of being granted or assigned over.*

A personal trust, which one man reposes in another, cannot be assigned over, however able such assignee may be to execute it.

Perk. § 99.—That a trustee cannot assign over his trust. 4 Inst. 85.

Therefore if a man grant unto another to be his carver, or sewer, or chamberlain, &c., these cannot be granted over.

Perk. § 101. But for this vide head of *Officers*.

A guardian in socage may grant the wardship over to another ; but such grant shall not be effectual after the death of the grantor, because by the law of nature such guardianship belongs to the next of kin.

2 Roll. Abr. 46. But for this vide Vaugh. 180.

If a man gives his horse to another to go to York, he must go with him himself, and not give him to another to go there.

2 Roll. Abr. 46 ; 22 E. 4, 6 a ; Br. Trespass, pl. 362.

(E) What Ceremony is requisite to the Perfection of a Grant : And herein of the Necessity of a Deed.

INCORPOREAL inheritances, which lie in (a) grant, cannot pass from one to another without deed, because of them no (b) possession can be delivered ; and they are not like corporeal inheritances which pass by livery ; and therefore he that claims them must (c) show a grant of them, which he cannot do without deed.

2 Roll. Abr. 62 ; Co. Lit. 169 a. (a) Such as a reversion or remainder. 2 Roll. Abr.

## (E) What Ceremony requisite to Perfection of a Grant.

62. So, of a rent-service or rent-charge. 2 Roll. Abr. 62.—So, of a hundred in gross. 11 H. 4, 89 b.—So, of a corody common. 12 H. 4, 17.—So, of the profits of a mill. 18 E. 3, 56 b. (b) And therefore a horse may be granted without deed. 42 E. 3, 23 b; Roll. Abr. 62.—So, trees growing may be granted without deed. 2 Roll. Abr. 62.—So, a license to hunt in another's chase may be granted without deed. 2 Roll. Abr. 62. (c) Where a jury find that a thing did pass, it shall be intended that there was a deed. Godb. 273, 274.

An advowson, or the next avoidance to a church, will not pass without deed; but, if a feoffment be made of a manor, to which an advowson is appendant, the same will pass without deed.

2 Roll. Abr. 62; Cro. Eliz. 163.

So, if A be seised in fee of land, to which a common for cattle levant and couchant on the land is appurtenant by grant made by deed within memory, and he make a feoffment of the land without deed, the common shall pass as appurtenant to the land, although it could not be created without deed.

2 Roll. Abr. 63, Sacheverel and Porter.

But, if A seised in fee of Black-acre and White-acre, grants Black-acre to C with common for his cattle levant and couchant on White-acre, this grant is not good without deed.

2 Roll. Abr. 63, Tanner and Hobbs.

If the king grant to J S the manor of D, and that he shall have *tot. talia tanta et eadem privilegia et libertates* in the said manor, which such an abbot had before; and the abbot had in the said manor *bona et catalla felonum*, &c.; and afterwards J S make a feoffment of the said manor to J D in fee, with the appurtenances without deed; this will not pass the liberties, the feoffment being without deed.

2 Roll. Abr. 62.

A parson cannot grant his tithes over to a stranger, for life or (a) years, because they lie merely in grant.

2 Roll. Abr. 63. (a) Not for a single year.

But a parson may lease his rectory for years by word without deed, by which the tithes will pass as annexed to the rectory.

2 Roll. Abr. 63. But see 29 Car. 2, c. 3.

Also a parson may, by parol, lease to a parishioner his own tithes for a year, years, or for life, for a valuable consideration, and the parishioner shall have them by way of (b) retainer; for the grant being for a valuable consideration is but in nature of a composition between the parson and the parishioner.

2 Roll. Abr. 63. (b) And if the lease be made to the parishioner and his assigns, the assignee of the land shall take advantage of it. 2 Roll. Abr. 63.

If A, seised of land in fee, grant the pasture of the land to B for years, and B license C to put in his cattle, this lease of the pasture is good without deed, and so is the license also; for this is a lease of the land to pasture, and not like common of pasture, which cannot be granted without deed.

2 Roll. Abr. 63, 64, Mountjoy and Terdrue.

The wardship of the body might be granted without deed, because it was an original chattel, *i. e.* a new interest in a thing wherein no one had an estate before.

Co. Lit. 85; 2 Roll. Abr. 62.

(F) What Words sufficient to create a good Grant.

But the wardship of an advowson, &c., was not grantable without deed, because it was not an original chattel, but was derived out of the inheritance of a thing lying in grant.

Co. Lit. 85.

A lease for years, made by a corporation aggregate, might at law be assigned without deed, though it could not be made (a) without deed; for though such corporation cannot make an estate without deed, yet an estate, when made by them, has the same properties with those of the like nature made by others.

Co. Lit. 85. (a) A corporation sole, such as a bishop, &c., may take a thing without deed, as a natural person may; but a corporation aggregate, such as a dean and chapter, mayor and commonalty, &c., cannot take any thing without deed. Co. Lit. 94 b; 2 Roll. Abr. 61.

(F) What Words are sufficient to create a good Grant.

HERE it may be observed, that in many cases, without express words, the law creates a good grant; because it is the design of the law to render all contracts binding and effectual, so far as the intention of the parties may be gathered from the deed, and such interpretation is made strongest against the grantor, because he is presumed to receive a valuable consideration for what he parts with.

2 Roll. Abr. 56.

As, if a lessor grant to the lessee by these words, *that at the end of the term it shall be lawful for him to take the corn growing to his own use*; this, from the intention of the parties, and common use of such words, amounts to a good grant, and transfers the property to the lessee; as a lease without impeachment of waste gives the lessee a property in the trees.

Hob. 132; 2 Roll. Abr. 56, S. C. cited. {See 2 John. Rep. 313, *Eman v. Turnbull*.}

So, if a man by indenture demises to J S the manor of D, and bargains and sells to him all the woods and trees, &c., on the said manor, to be felled and carried away at his pleasure, *habendum* the same manor for life, this is an absolute sale of the woods and trees; for the intention of the grantor appears by the distinct clause in the premises, and leaving the woods and trees out in the *habendum*.

2 Roll. Abr. 56, *Rawles and Mason*; 2 Brownl. 193, S. C.; et vide *Moore*, 831.

If a man obliges himself to J S, in an annual rent of 10*l.* *percipiendum annuatim de manerio de D*, and bindeth the said manor, and all the chattels therein to a distress, this amounts to a good grant of the rent, and J S may distrain for it.

2 Roll. Abr. 424.

If A grants and agrees with B, his heirs and assigns, that it shall be lawful for them at all times afterwards to have and use a way by and through a close of A's, this amounts to a good grant of the way, and not a covenant only for the enjoyment of it.

3 Lev. 303, *Holmes and Seller*.

The words *dedi et concessi* are general words, and may amount to a grant, feoffment, gift, release, confirmation, surrender, &c.

Co. Lit. 301; 2 Saund. 96, 97, S. P. cited; and though the jury find *quod concessit*, yet the court may adjudge a release according to the operation it has in law.

But a release, confirmation, or surrender, cannot amount to a grant,

(G) Where a Thing shall be said to pass by Grant.

nor a surrender to a confirmation or release, for these are peculiar conveyances destined to a special end.

Co. Lit. 302; et vide Lit. Rep. 200, that in grants of things which lie in grant, there are essential words which must be made use of.

§ A water-right appurtenant to a mill, passes by the word *appurtenances*. Pickering v. Stapler, 5 S. & R. 107.

The word *purchase*, implies a purchase in fee.

Hurst v. Dippo, 1 Dall. 20.

A deed of bargain and sale, in words *de presenti*, and in consideration of money paid or secured, is to be considered as a conveyance executed, although it contains a covenant by the grantor "to make a patent."

Willis v. Bucher, 3 Wash. C. C. R. 369.*g*

(G) Where a Thing shall be said to pass by Grant or some other Conveyance.

If a feoffment be made of a manor in lease for years, and livery be made without ouster of the lessee, by which the feoffment is void, yet, if the lessee attorn, this shall be good as a grant of the reversion.\*

Moore, 496. For this vide 2 Roll. Abr. 56, and tit. *Feoffment*. \*By 4 & 5 Ann. c. 16, § 9, grants are good without attornment.

If A by indenture enrolled bargains and sells lands to B, and his heirs, with a way over other of the lands of A, this is void as to the way, for nothing but an use passes by the deed; and there can be no use of a thing not *in esse*, as a way, common, &c., before they are created.

Cro. Ja. 189, Beaudley and Brooke.

A man demises, bargains, and sells a manor, part in demesne and part in tenant's hands for seventeen years; the party may choose either to take it by way of lease at common law, and then the tenants must attorn; or by way of bargain and sale without attornment. And this agrees with the policy of the common law, to take every man's grant, so as to pass such an interest as shall be most advantageous for the grantee; and since in this case the words allow a double way of taking it, the grantee shall be judge which is most beneficial.

2 Co. 35, Hayward's case.

If A bargains and sells land to B by indenture, and before enrolment they both join in a grant of a rent-charge to C, this after the enrolment shall be construed the grant of B, and the confirmation of A, because when the bargain and sale is enrolled, it has the effect of a deed enrolled from the making thereof, and therefore it must be the grant of B, who had the land at the time of the grant made. But, if the deed has never been enrolled, then it should have been the grant of A, and confirmation of B, because the land never passed from A, the deed being ineffectual and void without enrolment.

Co. Lit. 147.

If tenant for life and he in reversion join in a conveyance without deed, this to avoid a forfeiture shall be construed a surrender of the estate for life, and the conveyance of him in reversion; for it cannot be a grant or confirmation of him in reversion for want of a deed.

Plow. 140; Co. 76; 6 Co. 15 a.

But, if tenant for life and he in reversion join in a feoffment by deed, then each passes only his own estate; the tenant for life the freehold in possession, and he in reversion his reversion. And this cannot be a forfeiture,

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because he in reversion joined in a proper conveyance to transfer his reversion, and having passed it to another, has no interest left to entitle him to take advantage of the forfeiture.

Co. 76; Flow. 140.

β By the grant of a mill, or of land with a mill thereon, the waters, flood-gates, &c., which are necessary for the use of the mill, will pass as incident to the principal subject of the grant.

Le Roy v. Platt, 4 Paige, 77; 1 Serg. & R. 169; See 5 S. & R. 107; 2 Caines, Cas. 87; 10 S. & R. 63; 1 Penns. R. 402; 3 N. H. Rep. 190; 6 Greenl. 154, 436; 7 Mass. R. 6; Pickering v. Stapler, 5 S. & R. 107.

A grant of land which is covered by an arm of the sea only at high water, entitles the grantor to an action of trespass *quare clausum fregit* for taking away oysters from the rocks within the grant.

M'Kenzie's executors v. Hulet, N. C. Term. R. 181.g

(H) Where Grants shall be said to be good, or void, for Incertainty: And herein,

1. *What shall be a sufficient Description of the Thing granted, notwithstanding any Misrecital thereof.*

THE very matter and substance of every grant being nothing else, as my Lord Hobart says, but a declaration of the owner's will to transfer a thing to another; if by any words his intention appears to pass the thing, a slight mistake or error in the description will not vitiate the grant.

Hob. 229. β Uncertainty in a deed will invalidate it, but it must be such uncertainty as makes it impossible to tell what estate is granted, or who is first to take. Pearse v. Owens, 2 Hay. 234.g

As, where the *sub-chantor*, and *vicars choral* of Litchfield, made a grant to Humphrey Peto of 78 acres of glebe, and of their tithes predial and personal, and also of the tithe of the glebe, all of which late were in the occupation of Margaret Peto, which was not true; yet the grant was adjudged good, for the words *all which* are not words of restriction, unless when the clause is general,(a) and the sentence entire, but not when it is distinct.

Cro. Car. 548; 2 Mod. 3, 4, cited; Moore, 881, S. P. resolved. (a) So Roe v. Vernon, 5 East, 51.

But, where the thing is not granted by an express name, there, if a falsity is in the description of that thing, the grant is void; as, if A grant lands lately let to D in such a parish, and the lands were not let to D, and were also in another parish, the grant is void, because the lands are not particularly named.

2 Mod. 3.

β A constable sold a part of a tract of land for taxes, and described it in his deed as follows: "a certain tract of land, part of lot No. 300, containing two hundred and fifty acres." The deed was held to be void for uncertainty.

Havan v. Cram, Adams, 93.

A deed intended to convey a farm of "one hundred and four acres," contained the following clause, namely: "twenty-four acres of land in the farm I now live on to R W, to be in common and undivided, six acres to be in common and undivided, and the remainder of the said farm with the buildings to J W." Held, not to be void for uncertainty.

Canning v. Pinkham, Adams, 353.g

If A grants and confirms to B a rent of 5*l.* to be taken out of his lands,  
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which rent B has of the grant of his father ; though B never had any such rent from his father, yet this grant of A's shall be good to create a rent-charge in B ; for it is evidently the intention of A that B shall have a rent of 5*l.* out of his land ; and a mistake or error in the description of the thing (*a*) referred to shall not render the true design of the contract ineffectual and void.

Bro. tit. *Grant*, 69, 73 ; 2 Roll. Abr. 425, and vide Godb. 237. (*a*) But, if a man grant all his lands which he hath by descent from his father in D, the land which he hath from his mother does not pass. 2 Roll. Abr. 50.

If a man make a lease of eight tenements in D by several leases, and afterwards by deed, reciting seven of the said leases, grant the reversion to J S, with all lands, houses, and buildings in D, and the grantor have only these eight tenements in D, the reversion of the eighth tenement not recited shall pass, for the words *all lands*, &c., cannot otherwise be satisfied.

2 Roll. Abr. 49, Hagget and Giles.  $\beta$ A reservation of lands to certain Indians, by the Chickasaw treaty, is considered as an absolute grant, requiring only a location of the land. *Niles v. Anderson*, 5 How, 365.*g*

A bishop grants all his farms and hereditaments of Westdown in Westdown, in the county of Somerset ; the bishop has a rectory which extends itself into the county of Devon ; it was holden, that by force of the word *hereditament* the rectory passed, (*b*) but for so much only as lay in the county of Somerset ; as to that in Devon, it seemed to be void for uncertainty.

Moore, 176, pl. 310. (*b*) If a man grants his manor of D, in the county of M, and the manor extends itself into another county, no more passes than what lies in the county of M. 2 Roll. Abr. 50.

If a man hath lands in D and S, part of which lands his father had by purchase, and part by descent, and he grants *omnia terras et tenementa in D et S et modo in tenurâ J S*, &c., *vel aliquorum aliorum, et quæ G. Pater meus perquisivit de J D et aliis*, the lands which his father held by purchase only shall pass.

2 Roll. Abr. 51.

If a man lease his lands by a certain name, as Blackacre in the parish *de Maria Loades in civitate Glocester*, the land lying in Maria Loades shall pass, although it be not situated in the city of Glocester, for there was a sufficient certainty before expressed.

2 Roll. Abr. 52, *Robinson v. Button*.

So, if the lord license his copyholder for life to lease Blackacre in the tenure of J S for five years, and Blackacre is not in the tenure of J S but of the copyholder himself ; yet this amounts to a good license, for the lands being particularly named, reduces it to a sufficient certainty.

2 Roll. Abr. 52, *Wollison and Banbridge*.

If a man grant all his land called D, in the tenure, occupation, or possession of J S, and J S have part of the lands in D by lease, and as to the other part he only depasture his cattle there, yet all shall pass by the grant ; for whether his occupation be by right or wrong is not material, the words being made use of to describe the thing granted.

Co. Lit. 4 ; 2 Roll. Abr. 54.

{If the land is described in the deed by courses and distances, and also as bounded by certain known and established monuments or other fixed objects, and the boundaries according to the courses and distances vary

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from those by the monuments or other objects, the former must be rejected, and the grantee shall hold according to the latter.

2 Mass. T. Rep. 380, *Howe v. Bass*; 2 Cain. 367, *Jackson v. Lucett*; 3 Cain. 13, *Brandt v. Ogden*; 1 Johns. Rep. 157, S. C.; 2 Johns. Rep. 37, *Mann v. Pearson*; Taylor, 110, *Witherspoon v. Blanks*; *Ibid.* 116, *Bustin v. Christie*; *Ibid.* 136, *Harramond v. McGlaughon*; *Ibid.* 161, *Miller v. White*; *Ibid.* 303, *Smith v. Murphy*;}.

If a manor consist of copyhold tenants only, and there are no freehold tenants, without which in strictness there can be no manor, yet this being known by the name of a manor will pass by that name.

2 Roll. Abr. 45; 6 Co. 67.

A made a lease for years, *habend' a festo Purificationis*, and after by deed, reciting that he had made a lease to commence *a festo Annunciationis*, granted the reversion to another; the grant was holden good; for that the misrecital of the particular estate was not material so long as he had a reversion in him.

Hob. 121, *Withes and Casson*.

A, seised of the manor of B in right of his wife, makes a lease thereof for years, which upon the death of the husband and wife becomes void; and notwithstanding the lessee continues in possession; and the heir of the wife, to whom the land descended, reciting the said lease grants that J S, after the forfeiture, expiration, or other determination of the said lease, shall hold and enjoy the said manor, &c., for sixty years; this grant is void, and shall not take effect *in presenti*, or at the expiration of the said recited term.

2 Roll. Abr. 44, *Miller and Mainwaring*; Cro. Car. 397, S. C.; Sir W. Jones, 354, S. C.

But as to this matter, it seems by the better authority of the books, that if A reciting that B hath a lease for years of such lands, demises the same lands to C for years, to begin after the end or determination of the said lease to B, where in truth B hath not any lease at all of those lands, the lease to C shall begin presently; for in judgment of law a void limitation, and no limitation, is all one. So, if he recites a lease, which in construction of law appears after to be void, or misrecites a good lease in a point material, *habend'* from the end of the said lease, this new lease shall begin presently; though where the first lease is good in law, and only misrecited in a point material, the new lease can begin presently only in enumeration of years, not in interest, till the end of the first lease; for in these cases, the commencement of this new lease being referred to a thing which is not, cannot be any ways ascertained or governed thereby, and then it is as if no such recital had been, which would have left the lease to begin presently, as the strongest construction against the lessor, since there is nothing now to ascertain or determine its beginning at any other time.

Bendl. pl. 72; Andr. 3; Dyer, 116, pl. 70; Plow. 148 a; Roll. Abr. 849; Cro. Car. 399; Jon. 355; Co. Lit. 46 b; Lev. 77; Keb. 360; 2 Leon. 11, pl. 17; Vaugh. 73; 2 Lev. 242; Lev. 234; Sid. 460; 2 Keb. 322; Vent. 83.

King H. 8, in the 31st year of his reign, leased lands to one for twenty one years, and after granted the reversion to a bishop, who reciting all the lands contained in the letters patent, and the land itself before leased by name, and reciting the letters patent thus: That whereas H. 8, by his letters patent dated 20 H. 3, where in truth they were dated 31 H. 8, and also misreciting the date in the day of the demise of them, grants all the lands, tenements, &c., to the *first lessee* for a certain number of years, *post expirationem hujusmodi literarum patentium*; in this case, it seems

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that the date being mistaken, and the commencement of the new lease referred to the expiration of the said letters patent, when in truth there were no such letters patent as were recited, the second lease shall begin presently, and so by acceptance thereof will amount to a surrender of the first: *aliter* it would have been, if the second lease had been limited to begin after the end of the first term generally.

2 Roll. Abr. 55, Halswell and Ayleworth.

2. *Where a Defect in the Description may be aided by Relation to a Thing certain.*

If a grant be made of such liberties as such a town enjoys, the grant is good, being capable of being reduced to a certainty; for when the act of disposal relates to another thing, that thing becomes in a manner part of the disposition; and the standard referred to being certain, the grant by relation thereto becomes certain, according to the common maxim, *id certum est quod certum reddi potest*.

Hob. 174; Godb. 245; 2 Roll. Abr. 49.

But if a man grant to another so many of his trees as may be reasonably spared, this grant is void, for there is no standard to reduce it to a certainty.

Moore, 880; Hob. 168; Dav. 36.

If one makes a lease for years to another for so many years as J S shall name, this at the beginning is uncertain; but when J S hath named the years, this ascertains the commencement and continuance of the lease accordingly. But, if the lease had been made for so many years as the executors of the lessor should name, this could not be made good by any nomination, because to every lease there ought to be a lessor and lessee; and here the nomination, which ascertains the commencement of the lease, not being appointed till after the death of the lessor, makes the lease defective in one of the main parts of it, viz.: the want of a lessor, and therefore of consequence it must be void; which is also the reason, that in the first case the nomination ought to be made in the lifetime of the lessor, and not by J S after his death, for then it will be void.

2 Leon. 86; Godb. 25; Co. Lit. 45 b; Co. 155; 6 Co. 35; Plow. 6 b, 273 b; Lane, 62, 102.

If (a) A lets lands to B for so many years as B hath in the manor of D, and B hath then a term for ten years in that manor, this makes A's lease to him good, and fixes the measure and continuance thereof, so that B shall have the lands demised for ten years. So, (b) a lease to one during the minority of J S, who is then ten years of age, is a good lease for eleven years, if J S so long live; for if he dies sooner, that determines the lease, since nothing appears to extend it beyond his life, and his minority ceases at his death.

(a) Co. Lit. 45 b; 6 Co. 35. (b) Plow. 273; 3 Co. 19 b.

But, if a woman be *enseint*, and a lease be made till the issue *in ventre sa mere* shall come to full age, this is a lease only at will; for at the time when the lease is to take effect, it is uncertain when or whether the son will ever be born, and, consequently, the beginning, continuance, and ending of this lease is uncertain.

6 Co. 35 b.

β One brother conveyed to the other, by deed without words of inheritance, "all his part of the estate left to him by his father's will, both real and personal property," &c. By the father's will he devised as follows:



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“and the remainder of my real and personal property I will to be equally divided betwixt my children;” held, that the grantee took only a life estate; though Rogers, J., intimated that if the will had contained the words “heirs,” it would have been otherwise.

Lytle v. Lytle, 10 Watts, 259.*g*

3. *Where by an election given to the Grantee, he may reduce an uncertain Grant to a Certainty.*

If A seised of a great waste, grants the moiety of a yard-land lying in the waste, without ascertaining what part, or the special name of the land, or how bounded, this may be reduced to a certainty by the election of the grantee. But it is otherwise in the case of the king's grant, for there can be no election in that case, and therefore the grant is void for incertainty.

Leon. 30; Noy, 29; Co. 86.

So, if a man grant twenty acres parcel of his manor, without any other description of them, yet the grant is not void; for an acre is a thing certain, and the situation may be reduced to a certainty by the election of the (a) grantee.

Keilw. 84; 2 Co. 36. (a) The election must be made in the lifetime of the parties, and cannot be made by the heir or executor. Co. Lit. 145 a; 2 Co. 37 a; Hob. 174; Leon. 254.

But, if a man sell 20*l.* worth of his land, parcel of a manor, this is void, it being neither certain in itself, nor reducible to any certainty, for no man is made judge of the value.

2 Co. 36; Keilw. 84.

If a man grant 600 cords of wood out of a large wood, the grantee hath election to take them, when and in what part of the wood he pleases, without any appointment of the grantor, and, consequently, may assign his interest in them to a third person, and he shall have the like election.

5 Co. 24, Palmer's case; Cro. Eliz. 819; Moore, 691; Jon. 276, S. C.; Hob. 179, like point.

But, if one grant to me 1000 cords of wood, to be taken at my election, and the grantor or a stranger cut down part of the wood, I can take no part of that which is cut down, but must supply myself out of the residue still remaining.

5 Co. 24, in Palmer's case.

But, if A covenant with B, that he shall have twenty of the best trees in the wood of A, to be taken at the election of B within such a time, it is a breach of the covenant in A to cut down any of the trees within that time, because the latitude of election which B had is thereby abridged.

Vent. 271, Motteram and Jolly; 2 Lev. 142, S. C. adjudged.

If a man grant to another 200 fagots of wood out of all his lands, or 20*s.* in lieu thereof out of his said lands, *habendum*, the 200 fagots, or 20*s.* to him and his heirs, with clause of distress for the one or the other, at the election of the grantee; in this case the grantee hath an interest vested in him in the fagots before any election made by him; but as to the 20*s.* being given in lieu thereof, he hath no interest till he hath made his election.

2 Roll. Abr. 47, Southwell and Wade.

If A, seised of lands, grant to B, that when B pays 20*s.* that thenceforth

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he shall have and occupy the lands for twenty-one years, and after B pay the 20s.; this is become a good lease for twenty-one years from the time of such payment made; for though the commencement of it was contingent and uncertain, and depended upon B's election to pay the 20s.; yet after he hath paid them, this takes off all uncertainty, and fixes the commencement and continuance of the lease.

Co. Lit. 45 b; Roll. Abr. 849.

## (I) How Grants are to be expounded: And herein,

1. *How to be construed where there appears a Repugnancy in the words.*

GRANTS are to be construed according to the intention of the parties; and if there appears any doubt or repugnancy in the words, such (a) construction is to be made as is most strong against the grantor, because he is presumed to have received a valuable consideration for what he parts with.

2 Roll. Abr. 65; Co. Lit. 146, 314 b; 3 Atk. 136; {Willes, 332; 1 Hen. & Mun. 447.} [Words shall always operate according to the intention of the parties, if by law they may: and if they cannot operate in one form, they shall operate in that which by law shall effectuate the intention. Cowp. 600. {1 John. Ca. 399, 402, Jackson v. Beach; 2 Dall. 199, 203, Barnes's Lessee v. Irwin.}] For the judges have more consideration of the substance, namely, the passing of the estate, than of the shadow, namely, the manner of passing it. 3 Lev. 372. Hence, a deed made to one purpose, may enure to another; if meant for a release, it may amount to a grant of the reversion; or *e converso*. Touchst. 82; Goodtitle v. Bailey, Cowp. 597; so, if meant for a release, Roe v. Tranner, 2 Wils. 75; Willes, 682, S. C.; or grant, Osman v. Sheafe, 3 Lev. 370, it may operate as a covenant to stand seised. So, Doe v. Salkeld, Willes, 673; 2 Wils. 75, S. C. A conveyance by lease and release, having the word "grant" in it, may take effect as a grant and assignment, and pass a leasehold interest. Marshall v. Frank, Gilb. Eq. Rep. 143; Pr. Ch. 480; Doe v. Williams, 1 H. Bl. 25. And a deed intended as an appointment to uses may, having the words "limit and appoint" in it, operate as a grant so as to pass a reversion. It is not necessary that the word "grant" should be used in a grant, so long as the intention to grant be manifested in the deed. Shove v. Pincke, 5 T. R. 128. But in expounding a grant according to the intent, it must be done *according to the intent at the time of the grant*; as, if I grant an annuity to J S, until he be promoted to a competent benefice, and at the time of the grant is but a mean person, and afterwards he is made an archdeacon, yet if I offer him a competent benefice at the time of the grant, the annuity ceaseth. Cro. El. 35.] (a) The word *grant* implies a warranty. Cro. Ja. 233, 234.—In deeds, subsequent clauses, which are general, shall be governed by precedent clauses, which are more particular. 4 Mod. 69.—Words of a known signification, but so placed in the context of a deed that they make it repugnant and senseless, are to be rejected equally with words of no known signification. Vaugh. 176. β Legislative grants of exclusive privileges, being in derogation of public rights belonging to the state, or to its citizens generally, must be construed strictly, and with reference to the intent and particular objects of the grant. The grant to a corporation of the right to erect a toll bridge across a river, without any restriction as to the right of the legislature of the power to authorize the erection of another toll bridge across the same river so near to the first as to divert part of the travel which would have crossed the first bridge, if the last had not been erected. Mohawk Bridge Company v. Utica & Schenectady R. R. Company, 6 Paige, 554. See Binney's case, 2 Bland, 100.g

β Though it is an established rule of law that a deed shall be construed *ut res magis valeat quam pereat*, yet the language used must control; and if the language used imports nothing, if there is an entire uncertainty in the meaning, or an absolute repugnancy, the instrument will be deemed void.

Wright v. Pond, 10 Conn. 255.g

Therefore if a thing be granted generally, and there come a viz. which destroys the grant, it is void, being repugnant to the thing first granted.

Moore, 880.

As, if there be a demise of a parsonage with the lands and woods,

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except the woods; this exception is void; for the woods being specially granted in the premises cannot be restrained afterwards; *secùs*, if the woods had not been specially granted.

Moore, 881.

So, if a lease for years be made to a man and his assigns, provided that he shall not assign; this proviso is void, being repugnant to the premises, though it would be good, had the word *assigns* been left out.

Moore, 811.

β An estate is limited by deed to the heirs of the body, and afterwards there is a clause empowering tenant in tail to sell; this latter clause is to be rejected as repugnant.

Pearie v. Owens, 2 Hay. 234.g

If a man grant a rent out his land, with clause of distress, and by a proviso in the deed, or by deed of defeasance, provide that the grant, nor any thing therein contained, shall be construed to extend to charge his person by writ of annuity; in this case the person of the grantor is not chargeable, because the charge upon the person arising only from the manner of construing grants, which for the consideration given ought to be extended as far as the words will bear against the grantor, there can be no room for such construction, when by the express words of the grant the person of the grantor is not charged; for no implication shall be admitted to overthrow an express clause in the deed.

Lit. § 220; Poph. 87; 6 Co. 87 a.

But, if the proviso had been also, that the grant, nor any thing therein contained, should charge the land, that proviso had been void, as repugnant to the grant.

Co. Lit. 146 a.

So, if a man grant a rent-charge out of the manor of Dale, in which the grantor has no interest, with a proviso that the grant shall not charge his person; this proviso is void, because the grantor having nothing in the manor of Dale could not by any act of his charge it; and, consequently, the grantee having no remedy for his annuity but against the person of the grantor, the proviso to exempt his person is void, as rendering the whole grant ineffectual. And if in this case the grantor had been seised of the manor, and had granted a rent-charge out of it *for the life* of the grantee, with a proviso that the grant should not charge his person; though the grantee himself could have no remedy but by distress, because that remedy being open to him, the proviso is to exonerate the person; yet upon the death of the grantee his executor may have an action of debt against the grantor for the arrears, because the executor has no other remedy for the recovery of them; for he cannot distrain after the grant is determined, and therefore the proviso to exempt the person is void against the executor, as rendering the grant useless and ineffectual.

Co. Lit. 146; 6 Co. 41; 8 Co. 65 b.

If one makes a lease for ten years at the will of the lessor; this is a good lease for ten years certain, and the last words are void for repugnancy. So, if one lets lands at will for a year *et sic de anno in annum*; this is a lease only at will by the first words, and the last words being repugnant shall not control them, nor add any more certainty to its continuance.

14 Il. 8, 13; Bro. tit. *Leases*, 13, 22.

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But, if the viz. or proviso be only explanatory, and not repugnant to the grant, it will be good; as, if a lease be made of three manors, rendering 10*l.* rent, viz. 5*l.* out of one, and 5*l.* out of another; this is good, and the third shall be discharged.

Moore, 880.

So, in case of a feoffment of two acres, *habendum* the one in fee, and the other in tail; the *habendum* only explains the manner of taking, but does not restrain the gift.

Moore, 880.

So, if an advowson be granted, viz. to present every second turn; this is good, the viz. being only explanatory.

Moore, 880.

And note as a general rule, that where it is impossible the grant should take effect according to the letter, there the law shall make such construction as that the gift by possibility may take effect.

Co. Lit. 183 b.

[Where the grant of a rectory from the crown contained an exception of all advowsons of the rectories, vicarages, and churches belonging to the premises, it was holden, that a perpetual curacy belonging to the rectory was not included in the exception, but passed by the grant; for a contrary construction would have severed the nomination of the curate from the fund out of which he was to be supported; would have made it questionable who was to maintain him, and left the ecclesiastical court destitute of means to compel such maintenance by sequestering the profits of the living.

Athrington v. Bishop of Chester, 1 H. Bl. 418.]

βThe great rule of construction with respect to deeds and contracts is to give that which will effectuate the intention of the parties, if such intention be consistent with the principles of law.

Hollingsworth v. Fry, 4 Dall. 347; Means v. The Presbyterian Church, 3 Watts & S. 303; Bridge v. Wellington, 1 Mass. 219; Wallis v. Wallis, 4 Mass. 135; Ellis v. Welsh, 6 Mass. 246; Bott v. Burnell, 11 Mass. 163.

Where the grantor, in consideration, &c., did thereby grant to S J P one-sixth part of a certain tract of land, or so much thereof as might be recovered in a certain suit then pending; held, to be a present conveyance of a life-estate only.

Gray v. Packer, 4 W. & S. 17.

A, by a deed conveyed to his brother B, without words of inheritance, "all his part of an estate left to him by his father's last will and testament, both personal and real property," &c. By his will, his father devised as follows; "and the remainder of my real and personal property I will to be equally divided betwixt my children." Held, that the grantor took only a life-estate.

Lytle v. Lytle, 10 Watts, 259.

Technical words in a deed are to be construed according to their legal meaning, although the instrument be drawn by a layman.

Ellmaker v. Ellmaker, 4 Watts, 89.

The grantor of a tract of land, reserved to himself, his heirs, &c., "all mineral or magnesia of any kind;" held, that he was entitled to chromate of iron found in the land.

Gibson v. Tyson, 5 Watts, 34.

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A grant made to A and his heirs and assigns, of all trees and timber standing and growing in a certain close for ever, with liberty to cut and carry them away at pleasure, vests in the grantor an estate of inheritance in trees and timber, not only then growing, but which might be thereafter growing in the close, with an exclusive interest in the soil of the close, so far as may be necessary for the support and nourishment of the trees.

Clap v. Draper, 4 Mass. 266.g

2. Where the Premises differ from the Habendum, and therein how far the Habendum may enlarge or abridge the Grant in the Premises.

The office of the premises of the deed is to name the grantor and grantee, and the thing to be granted or conveyed; and of this it must be observed as regularly true; 1st, That no person not named in the premises of the deed can take any thing by the deed, though he be afterwards named in the *habendum*; because it is the premises of the deed that make the gift, and therefore when the lands, &c., are given to one in the premises, the *habendum* cannot give any share of them to (a) another, because that would be to retract the gift already made, and, consequently, to make the deed contrary and repugnant in itself.

Co. Lit. 6. β The technical meaning of the word *premises*, in a deed of conveyance, is everything which precedes the *habendum*. Sumner v. Williams, 8 Mass. 174. The subject of the deed is to be ascertained from the premises. Manning v. Smith, 6 Conn. 289. But a deed is good although there are no words of conveyance in the premises. Bridge v. Wellington, 1 Mass. 219.g But for this vide tit. *Fcoffment*, letter (C). β See also Sumner v. Williams, 8 Mass. 174; and tit. *Fcoffment*, ante.g (a) But a man not named in the premises may take an estate in remainder by limitation in the *habendum*. 2 Roll. Abr. 68; Hob. 313; Cro. Ja. 564. [In 3 Leon. 60, it is said that the *habendum* shall never introduce one who is a stranger to the premises to take as grantee, but he may take by way of remainder.]

2dly, That the *habendum* cannot pass any thing that is not expressly mentioned or contained by implication in the premises of the deed; because the premises being part of the deed by which the thing is granted, and, consequently, that make the gift; it follows, that the *habendum*, which only limits the certainty and extent of the estate in the thing given, cannot increase or multiply the gift; because it were absurd to say that the grantee should hold a thing which was never given to him.

2 Roll. Abr. 65. β It is clear by the current of all the authorities that an *habendum* may enlarge, expound, or qualify and vary the estate granted in the premises. Moss v. Sheldon, 3 Watts & Serg. 160. But it must not contradict or be repugnant to such estate. Wager v. Wager, 1 S. & R. 375, 380. See Manning v. Smith, 6 Conn. 289; Miller v. Scofield, 12 Conn. 335.g

If a termor grant a term of 1000 years to the grantee, his executors, administrators, and assigns, *habendum* after the death of the grantor and his wife, for the residue of term of 1000 years, in this case the *habendum* being repugnant to the premises is void, and the grantee shall have the term presently.

3. How the Words of a Grant are to be construed as to the Things intended to be granted.

If a prebendary, who has an advowson annexed to his prebend, make a lease for years of several parcels thereof, together with all the commodities, emoluments, profits, and advantages to the prebend belonging; these general words will not pass the advowson, for they signify things (b) gainful, and words in grants shall be construed according to a reasonable and easy sense, and not strained to things unlikely or unusual.

Hob. 304. (b) So, an appropriation will not pass by the name of an advowson.

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44 E. 3, 33. And for this reason it was holden by two judges against two, that if a prebendary having a peculiar jurisdiction make a lease of his prebend, with all profits, commodities, advantages, &c., thereto belonging, the ecclesiastical jurisdiction did not thereby pass to the lessee, so that he might make a commissary, being a thing annexed to the spiritual person, and not to the corps of the prebend. Lev. 125; Keb. 538, 639.—Yet an advowson will be contained under the name of a tenement, and therefore a license to purchase lands and tenements in mortmain extends to advowsons. Dyer, 350.—So advowsons pass by the name of all hereditaments lying where the church lieth. Dyer, 322.—The word *tenement* passes any thing whereof a man may be seised *ut de libero tenemento*; *hereditament*, any thing wherein a man may have an inheritance. Co. Lit. 6 a. [Touchst. 91; 3 Atk. 82. Therefore an heir-loom, though neither land nor tenement, but a mere movable, yet being inheritable, is comprised under the general word *hereditament*; and a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament. 3 Co. 2.]

So, if a man grant all his woods and trees, apple trees will not pass.

Hob. 304.  $\beta$  See Clap v. Draper, 4 Mass. 266.g

My Lord Coke says, that by a grant of (a) *vestura terræ*, the underwood and sweepage pass, but not the soil, timber trees, or mines; nor do these pass by a grant of the herbage, though livery and seisin be made.

Co. Lit. 4 b. (a) But it hath been since holden, that the grant of *vestura terræ* with livery passes the soil, and that the grant of *prima vestura* for no certain time passes the first cutting only; but that from such a day to such a day, it passes the soil. Vent. 393. But see Hargr., note 1. Co. Lit. 4 b.

A grant of *separalis piscaria* passes neither water nor soil; but a grant of the water passes both the water and piscary, but not the soil.

Co. Lit. 4; Dav. 55; but see 2 Salk. 637, *contr.*, and note 2; Co. Lit. 4 b.

But a grant of *stagnum* or *gurgis* passes both water and soil.

Co. Lit. 5; Vaugh. 108.

General words, as honour, isle, castle, will pass things compound; as honour or castle will pass divers manors or things simple of different natures; as fearm or farm will pass houses, lands, tenements; a ploughland, or so much as one plough can till; an oxgang, or so much as one ox can till, may pass arable, meadow, pasture, and wood, &c., necessary for such tillage.

Co. Lit. 5.

A grant of a grange passes a barn or stable with its curtilage.

Co. Lit. 5.

So, a grant of a house passes the house, orchard, and curtilage.

Co. Lit. 5.

So, if a man grant a forest, warren, chase or vivary, by these words both the ground and privilege pass.

Co. Lit. 5.

A grant of a (b) boilery of salt passes the soil; by the grant of *ovile*, a sheep-cot, and not a sheep-walk, passes.

(b) Co. Lit. 4; 2 Roll. Abr. 2; Godb. 273.

$\beta$  A grant of a river, *eo nomine*, will not pass the soil of the river, nor of an island in it.

Jackson d. Teed v. Halstead, 5 Cowen, 216.g

If a man grant all his lands and tenements, by these words a (c) common in gross doth not pass.

29 Ass. 9; 2 Roll. Abr. 57. (c) But by the grant of a tenement a reversion passes. 37 H. 6, 5. By a grant of all a man's lands and hereditaments, copyholds will not pass. Owen, 37.—But, if a man grants all his lands and tenements in D, a lease for years passes. Plow. 424, *cont.*; Bro. tit. *Grant*, 155, and vide Godb. 183, S. P.,

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but no resolution. —So, if a man grant all his lands and tenements in D, a rent-charge which he has issuing out of lands there passes. 2 Roll. Abr. 57.

By a grant of land the houses and buildings thereupon pass.

2 Roll. Abr. 57; Palm. 320. {So will the growing crops. 3 Johns. Rep. 222.}

A grant describing the lands as *stretching along the bay*, &c., extends to the *ordinary* high water-mark.

2 Johns. Rep. 357; Cortelyou v. Van Brundt, Harg. Law Tr. 12.}

If A demise lands, and grant that the lessee shall have house-bote in other lands of the lessor not demised, the lessee may, besides those granted, take house-bote, &c., on the demised premises.

Moore, 6, pl. 23.

If lessee for years of the pawnage of a park grants all his goods and chattels, movables and immovables within the said park, by these words the pawnage passes.

3 Leon. 19.

If a person grant an acre called *two acres*, an acre only passes.

Cro. Eliz. 633.

If a man grants (a) *omnia bona sua*, trees growing do not pass; otherwise if they had been cut down at the time of the grant.

18 E. 4, 16; 2 Roll. Abr. 58. (a) So, of a grant *de omnibus averiis suis*, deer will not pass. 2 Roll. Abr. 57.

If a man lease lands for life, excepting the trees growing, and afterward he grant the reversion to another, by the grant of the reversion the trees pass, for they are annexed thereto.

11 Co. 50, Liford's case.

If a man grant all his chattels, a term which he hath in extent on the statute merchant passes; for this is but chattel.

11 H. 6, 7.

If a man grant all his (b) goods and chattels, an obligation in which J S is bound to him passes hereby, and by these words he hath an interest in the parchment or paper, although the debt itself being a chose in action cannot be granted or assigned over.(c)

Dyer, 25; 2 Roll. Abr. 58. (b) A devise by these words will not carry debts due to the testator. Dyer, 59 b, pl. 15. (c) But see tit. *Assignment*.

If a man grant *omnia bona et catalla sua*, a term for years which he hath in right of his wife hereby passes.

9 H. 6, 52 b; 2 Roll. Abr. 58.

So, if a man grants *omnia bona et catalla sua*, the goods which he hath as executor shall pass, as well as his own proper goods.

For this vide 2 Roll. Abr. 28; Noy, 106; 4 Leon. 22, *contr.*; 1 Leon. 263, *contr.*; 3 Bulst. 8, *contr.*; Br. Done, &c., p. 47, *contr.*; 12 Co. 16; 1 Leon. 202; 2 Leon. 56.

A grant of *bona et catalla felonum* will not carry the goods of a *felo de se*.

Sid. 420; Vent. 32; Saund. 274.

|| If the king grant the goods and chattels of felons of themselves, the grantee shall not thereby have debts due to such felons.

12 Co. 1 b; 1 Leon. 202; 2 Leon. 56; 1 Saund. 274. But in 2 Roll. Abr. tit. *Prerogative* (E), pl. 1, it is holden, that if the king grant *certain liberties*, and among other things, grant *omnia bona et catalla felonum de se* in such a place, it shall pass obligations, specialties, and debts due to the felon; for though in other cases a grant of *omnia bona et catalla* by the king will not pass specialties and debts, 1 Sid. 142, yet in a grant of a liberty it will. See also Com. Dig. tit. *Waife*, (C). So, by a

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grant of goods and chattels of felons of themselves, the grantee shall have the *ready money* of such felons. Anon. 2 Show. 132.¶

βA conveyance to three Indian chiefs, to them and their generations, and "to endure as long as the waters of the Delaware should run," held, to pass only a life-estate.

Foster v. Joice, 3 Wash. C. C. R. 498. But in Vermont, a conveyance to one, his heirs and assigns, "*so long as wood grows or water runs,*" creates a fee-simple. Arms v. Burt, 1 Verm. 303.

A grantor by deed for a valuable consideration, "granted, bargained, sold, conveyed and assigned all debts, dues, or demands, whatsoever and wheresoever, real, personal, and mixed, which are due and owing, or of right belong to me, either by virtue of inheritance, legacies," &c. to the grantee his heirs and assigns for ever; held to pass real estate.

M'Williams v. Martin, 12 S. & R. 269.g

¶Where A granted to B land of unequal width, described as abutting on a road on his own soil, and it, in fact, abutted in the broadest part upon the road, but in the narrowest part on a narrow strip of the grantor's land between the road and the premises granted, it was held that the grantor, and those claiming under him, were estopped by the grant from preventing the grantee coming out into the road over this narrow strip of land.

Roberts v. Karr, 1 Taunt. R. 495.

Where there is a grant of a *particular* thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation mistaken or false respecting it, will not frustrate the grant; but where a grant is in general terms, there the addition of a *particular* circumstance will restrain and modify it. Therefore where one having customary estates, some *compounded* and some uncompounded, surrendered to the use of his will all and singular his tenements which he held of the lord by copy of court roll, in whose occupation soever, being of the yearly rent to the lord 4*l.* 10*s.* 8½*d.*, and *compounded for*, it was held that these last words restrained the operation of the surrender to the copyholds compounded for; and that the words as to the rent (though the sum was not accurate) could not impugn that restriction.

Roe dem. Conolly v. Vernon, 5 East R. 51.

A, in 1792, granted a lease of the opera to B, B covenanting not to grant rights of admission, except 253 admissions, without consent of A, and in case of any of the covenants being broken the lease to be void. B then assigns his interest to trustees to receive the profits and pay the debts, &c., who leave B in the management of the concern; in the course of which, in 1799, B grants a ticket of admission for twenty-one seasons. The trustees do not take possession of the theatre till 1800, and they suffer B to exercise his privilege of admission till 1814, when the ticket is stopped, on the ground that B had no right to make such a grant. It was held; first, that the covenant by B with A not to grant rights of admission, supposing it to have been broken, did not avoid the grant to C; second, that as the trustees had left B in the management of the theatre, they must be taken to have authorized the grant, and could not afterwards disavow it; thirdly, that this was not an interest in land, but a license to C to enjoy the privilege of admission, and, therefore, that it was not necessary that it should pass by deed, or that B should have been authorized by the trustees in writing to make such a grant.

Taylor v. Waters, 7 Taunt. 374; 2 Marsh. 551.



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The owner of the fee granted to A, his fellow-adventurer, &c., free liberty to dig for tin, and all other metals, throughout certain lands therein described, and to raise, make merchantable, and dispose of the same to their use, and to make adits, &c., necessary for the exercise of that liberty, together with the use of all waters and watercourses, excepting to the grantor liberty of driving any new adit within the lands thereby *granted*, and to convey any watercourse over the premises *granted*, *habendum* for twenty-one years. Covenant by grantee to pay one-eighth share of all the ore to the grantor, and all rates, taxes, &c., and to work effectually the mines during the term, and then in failure of performance of the covenants, a right of re-entry was reserved to the grantor; held, that the deed did not amount to a lease, but was a mere license to dig and search for minerals.

Doe v. Wood, 4 Barn. & A. 724; and see Chetham v. Williamson, 4 East, 469; Hodgson v. Field, 7 East, 613.

A being seised in fee of the manor of F and the demesne lands, and of all coal mines lying under the manor, enfeoffed C D of certain closes, except and always reserved to the feoffor, his heirs and assigns, all tithes, &c., and also except and reserved to the feoffor and his heirs all coals in all or any of the said lands and premises, together with free liberty for the feoffor and his heirs, and his and their assigns and successors, at all times during the time that the feoffor and his heirs should continue owners of the demesne lands of F, to sink and dig pits, or otherwise to sough and get coals in all and every the lands and premises, &c., he, the said feoffor, and his heirs paying to the said feoffee, his heirs and assigns, such satisfaction for the damages as two neighbours, indifferently chosen, should award. The heirs of the feoffor having conveyed the manor and demesnes, and all coal mines, to a purchaser in fee, it was held, the coals, by the exception and reservation, passed to the purchaser, and that he was entitled under the liberty reserved, to enter and get coals, as long as he was owner of the demesne lands.

Earl of Cardigan v. Armitage, 2 Barn. & C. 197; and see Hodgson v. Field, 7 East, 613; Bowler v. Woolley, 15 East, 444.

The fee-simple of minerals passes by a grant or liberty to take them. Stoughton v. Leigh, 1 Taunt. 402.

A grant of part of the chancel of a church by a lay impropriator to A, his heirs and assigns, is not valid in law.

Clifford v. Wicks, 1 Barn. & A. 498.

A grant of wreck was made by Henry the Second to the proprietors of certain lands on the coast, and confirmed by Henry the Eighth. The proprietors of those lands having, forty years ago, with a view to reclaim sea mud, run an embankment across a small bay which was used to be left dry at low water, and having ever since asserted without opposition an exclusive right to the soil of the bay, though the bank was forced by tempest; held, that such usage was evidence whence anterior usage might be presumed, which, coupled with the general terms of the grant, served to elucidate it, and to establish the right so asserted.

Chad v. Tilsed, 2 Bro. & Bing. 403; and see Gray v. Bond, 2 Bro. & Bing. 667; 5 Moo. 527.||

4. *Where a Thing shall be said to pass as appendant, appurtenant, or incident.*

It seems agreed, that several things will pass as appendant or appurtenant to the principal thing granted without any express mention of

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them; as, if a (*a*) man grant a manor to which an advowson is appendant or villain regardant, without saying *cum pertinentiis*, yet these pass as (*b*) appendant or appurtenant to the manor.

10 Co. 64; Whistler's case, 2 Roll. Abr. 60; Goulds. 42; Style, 78; Co. Lit. 307 a. (*a*) But this must be understood of a grant by a common person; for if the king grants such a manor, or grants a manor *cum pertinentiis*, yet the advowson does not pass. Plow. 251; 10 Co. 64. [See Hargr. note 2 Co. Lit. 12 b, 13th edit.] (*b*) Here note, as regularly true, that nothing can be appendant or appurtenant, unless it agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal; but things incorporeal which lie in grant, as advowsons, villains, commons, and the like, may be appendant to things corporeal, as a manor-house or lands; or things corporeal to things incorporeal, as lands to an office; also they must agree in nature and quality; for a common of turbary or of estovers cannot be appendant or appurtenant to land; but to a house to be spent there; nor a leet that is temporal, to a church or chapel which is ecclesiastical; neither can a nobleman, esquire, &c., claim a seat in a church by prescription, as appendant or belonging to land, but to a house, because such a seat belongeth to the house in respect of the inhabitancy thereof. Co. Lit. 121 b, 122 a.—Also, the thing to which another is appendant must be of perpetual subsistence; and therefore an advowson which is said to be appendant to a manor, is in truth appendant to the demesnes of the manor, which are of perpetual subsistence and continuance, and not to rents or services, which are subject to extinguishment and destruction. Co. Lit. 122 a.

So, if a man at this day grant to a man and his heirs common in such a moor for his beasts *levant* and *couchant* upon his manor; or, if he grant to another common of estovers or turbary in fee-simple, to be burnt or spent within his manor; by these grants those commons are appurtenant to the manor, and shall pass by the grant thereof.

Co. Lit. 121 a.

So, if A, seised of 100 acres of land to which a common for cattle *levant* and *couchant* is appurtenant, by grant made thereof within time of memory, grant ten of the said acres only, without saying *cum pertinentiis*; yet a proportionable common for the cattle *levant* and *couchant* on these ten acres shall pass; for being a common appurtenant, it is in its nature apportionable.

2 Roll. Abr. 60, 61, Sacheverel and Porter.

But, if A grant the third part of a manor to which an advowson is appendant, though he adds *cum pertinentiis*, yet the advowson does not pass unless it be expressly mentioned.

Savil. 103, Long v. Bishop of Gloucester.

By a grant of a messuage *sive tenementum*, only the house and circuit thereof passes, but not the garden, for these are distinct; for in a *præcipe quod reddat* the demand must be *de uno messuagio et uno giardino*, and the word *tenement*, as here used, is only synonymous to the word *messuage*; but had it been a grant of a messuage and tenement, it might be otherwise.

Moore, 24, *per* Dyer and Weston, contrary to Brown. But Weston held, that the garden should pass by the name of messuage, with an averment, that they were occupied together.

Where a house or land belongs to an office, or a chamber to a corody, the office or corody being granted by deed, the house and land follow as incident or belonging to it without livery, because the office is the principal, and the land but appertaining to it.

Vaugh. 178.

If a man grant his saddle with all things thereunto belonging; stirrups,

## (I) How Grants are to be expounded.

girths, and the like do pass. So, if a man grant his viol, the strings and bow will pass.

Vaugh. 109.

By a grant of a house *cum pertinentiis*, a conduit which conveys water to the house passes, and the owner may, without alleging a prescription or grant, enter upon the soil of another to repair it, but this must be done in convenient time.

Moore, 682, Browne and Nichols.  $\beta$  See Pickering v. Stapler, 5 S. & R. 107.*g*

It was found by special verdict, that A was seised of a mill in fee, and that he built a kiln at the end of the close wherein the mill stood, and then granted the mill *cum pertinentiis*; and if the kiln passed was the question; and the court held clearly, that if it had been found in the special verdict, that the kiln had been necessary to the mill, that then it should pass by a grant of the mill; so, if it were erected for the use of the mill, as sluices, though never so far off; so a dove-house to a dwelling-house; but as it was here barely found, there was no colour to adjudge it to pass.

Sid. 211; Lev. 131; Keb. 736, S. C., Archer and Bennet.  $\beta$  An exception of a mill site in a grant or lease operates as an exception of the soil of the mill site, and so much land as is required for the mill pond, and for erecting and carrying on the business of a mill. Jackson v. Vermilyen, 6 Cowen, 677. See Whitmore v. White, 2 Caines, Cas. Er. 87.*g*

If a man grants to another the use of a pump, the grantee, as incident to the grant, may enter on the ground of the grantor to repair it; for this privilege is given to him as incident to the grant.

Pomfret v. Rieroft, 1 Saund. 322.

So, if a man license another to lay pipes of lead on his ground to convey water to his cistern, although the ground is not hereby granted, yet the grantee may enter thereon to repair the pipes.

1 Saund. *ubi supra*; Hodgson v. Field, 7 East, 613, S. P.

¶ Where a man granted to another, his heirs and assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide, which divided those houses from a house there belonging to the grantor, the right of using the said piece of land as a foot or carriage way; and gave him "all other liberties, powers, and authorities incident or appurtenant, needful or necessary to the use, occupation, or enjoyment of the said road, way, or passage;" it was holden, that by these words the grantee had a right to put down a flag-stone upon this piece of land in front of a door opened by him thereinto out of his house. For by Chambre, J., this is nothing more than a grant of a way, to which the right of repairing, when it becomes necessary or convenient, is incident: and the above words could have been inserted with no other view than rather to enlarge the right which the common law would give.

Gerrard v. Cooke, 2 N. R. 109.¶

If a man grant the fish in his water, the grantee may fish within, but he cannot cut the banks.

Hob. 234; 2 Roll. Abr. 60.

{The right of fishing in a bay does not give any right to erect huts on the shore for that purpose.

2 Johns. Rep. 357, Cortelyou v. Van Brundt.}

So, if a man grant or reserve wood, it implies a liberty to take and carry it away.

Hob. 234; 2 Roll. Abr. 60; 2 Lutw. 1480; 1 Ld. Raym. 552.

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|| So, if a man, having a close surrounded by his own land, grants the close to another in fee, for life, or years; the grantee shall have a way to the close over the grantor's land as incident to the grant. So it is, if he grants the land, and reserves the close to himself.

Clarke v. Rugee, 2 Roll. Abr. 60; Cro. Ja. 170, S. C.; Jorden v. Atwood, Owen, 122; Staple v. Heyden, 6 Mod. 3; Howton v. Frearson, 8 T. R. 56.||

5. *What Estate or Interest shall be said to be granted.*

It is holden by Chief Justice Holt, that if a termor grants the land, the grantee is but tenant at will; for it does not appear that the grantor meant to pass his whole interest, and this is enough to satisfy the grant.

1 Salk. 346.

Also, it was adjudged in B. R. that if a termor for 1000 years, by deed reciting the original lease of the lands, grants the said lands, together with the said (a) recited lease, to the grantee, his executors, administrators, and assigns, and all writings relating to the premises, *habendum* to the grantee, his executors, &c., after the death of the grantor and his wife, for the residue of the term of 1000 years, that hereby the term does not pass.

Salk. 346, *Germain & Uxor v. Orchard*. (a) But *per Holt*, the word *lease* would pass the term, but here it is the recited lease, which can signify nothing but the deed. Also he agreed, that if a termor devise the land, all the term passes; for the devisee cannot be tenant at will, because the deviser must die before the devise can take effect, and one cannot be tenant at will to a dead man. Salk. 346.

But this judgment was reversed in the Exchequer-chamber, where it was holden, that by the grant of the lands in the premises to the grantee, his executors, administrators, and assigns, the whole term of 1000 years was transferred; and since by the premises the whole term passed presently, but by the *habendum* not till after the death of the grantor and his wife, they held that *ex consequenti* the *habendum* was repugnant to the premises, and void.

Salk. 346, adjudged in the Exchequer-chamber, and affirmed in the House of Lords.

If a man by deed grant a rent-charge, reversion, common, or any thing else which lies in grant, without mentioning any particular estate, the grantee hath an estate for term of his own life, because a man's own act is taken most strongly against himself; and where the words of the deed will bear two senses without injury to any one, the purchaser deserves the most favour, and the construction that most enlarges his interest is to be preferred. Besides, being granted to him, it cannot be supposed out of him as long as the same person continues.

Roll. Abr. 845; Co. Lit. 42 b; 8 Co. 85.

If A grant a rent-charge to B and his heirs, *habendum* to him and his heirs, to the use of him and his heirs for the life of J S, this is only a descendible estate for the life of J S and not a fee-simple.

Moore, 876, pl. 1227, *Wilkins v. Perrat*.

If an office be granted to a man to have and enjoy so long as he shall behave himself well in it, the grantee hath an interest for life in the office; for since nothing but his misbehaviour can determine his interest, no man can prefix a shorter time than his life, since it must be his own act, (which the law does not presume to foresee,) which can make his estate of shorter continuance.

Co. Lit. 42 a; Roll. Abr. 844; 1 Show. 523; Show. P. Cases, 161; 4 Mod. 173. ↓

## (I) How Grants are to be expounded.

If the king grants an office at will, and grants a rent to the patentee for his life, for the exercise of his office; this is no absolute estate for life; because the rent being granted on account of the office and in discharge of the duty of the place, whenever his interest in the office ceases, the rent is determined, because it was at first granted for the exercise of the office, which he is no farther concerned in.

Co. Lit. 42 a.

If a man makes a lease for forty years, and grants that the lessee shall have house-bote, fire-bote, and cart-bote, in other lands of the grantor's not demised; though it is not said for how long, yet the grantee shall have such privilege during the continuance of the lease, and such privilege shall go to his executors and assigns.

Moore, 6, pl. 23.

β A grant of land to A, to continue for a yard to build vessels in, by A and his heirs, so long as they shall think fit, but if they cease to use it for this purpose, not to be sold by them, but for ever to remain to B and his heirs, gives A no more than an estate for life, and the remainder to B is good.

Rutty v. Tyler, 3 Day, 470.

A deed of a farm, reserving the highways through such farm, conveys the whole title of the grantor, subject only to the right of passage.

Hart v. Chalker, 5 Conn. 311.g

6. *At what Time the Thing granted becomes vested, and when the Grantee must take the same.*

{ A grant immediately on the execution of the deed, divests the estate out of the grantor, and vests it in the grantee before his assent to it; for his assent is presumed to an act which is for his benefit until he dissents.

2 Vent. 198, 208, Thompson v. Leach; 1 Show. 296, S. C.; 3 Lev. 284, S. C.; 1 Show. P. C. 150, S. C.

And the same presumption will be made, where the grantee is required by the deed to do an act useful to his neighbour, and not injurious to himself; as if the estate is conveyed to him in trust for the creditors of the grantor.

1 Bin. 502, 518, 519, Wilt v. Franklin. }

If a man grant a thing to be taken yearly, and the grantee neglect to take it for one year, he cannot take double the quantity the next; as, if a man grant to another and his heirs 200 (a) fagots of wood, to be taken yearly, and the grantee neglect to take any for the first year, he cannot the next take 400 fagots; for by this means he might destroy all the woods of the grantor.

2 Roll. Abr. 64, Southwell and Wade. (a) So, if a man grant a common for ten head of cattle yearly, the grantee, if he neglects to feed the common for one year, cannot put on double the number the next. 27 H. 6, 10.

But, if the grantor be to render the thing, as, if A grant 200 fagots of wood to be taken yearly out of his lands, with clause of distress, and the grantor be to cut and make up the fagots and carry them to the house of the grantee; if the grantor neglect to do this for the first or any one year, the grantee shall have double the quantity the next; for in this case the grantor was to do the first act, and shall not have any advantage by his neglect.

2 Roll. Abr. 65.

Guardian.

He who hath the next avoidance of a church, must present to the next that happens after such grant, at his peril.

7 Co. 28 ; Bulst. 26.

If a man grant all his trees to be taken within five years, the grantee cannot take any after the expiration of the five years ; for this is in nature of a condition annexed to the grant. But, if the grant be of the trees, with covenants either on the part of the grantor or grantee, that they shall be taken away in five years, there the grantee may take them after the expiration of five years, and the grantor must pursue his remedy by action of covenant.

Moore, 882.

So, if a man grant corn growing, and the grantee do not take it away in a reasonable time, by which the grantor receives a prejudice, he may have an action on the case.

Moore, 882, *per* Hutton.

## GUARDIAN.

A GUARDIAN (*a*) is one appointed by the wisdom and policy of the law to take care of a person and his affairs, who by reason of his (*b*) imbecility and want of understanding is incapable of acting for his (*c*) own interest. And it seems, that by our (*d*) law his office originally was to instruct the ward in the arts of war, as also in those of husbandry and tillage, that when he came of age he might be the better able to perform those services to his lord, whereby he held his own land.

(*a*) For the derivation and several significations of the word *guardian*, vide 2 Inst. 12. (*b*) And therefore Bracton, l. c. 38, f. 86, treating thereof, says, *de illis, qui minores sunt et infra etatem, et quos oportet esse sub tutelâ et curâ aliorum, eo quod se ipsos regere non norunt, et quorum quidam debent esse sub custodiâ domini eum terris et tementis, quæ sunt de feodo eorûm, et quidam sub custodiâ parentum et proximorum consanguineorum, ut prædict. est, et quibus dantur eustodes aliquando de jure de antiquo feoffamento, et aliquando curatores ab homine.*—So, *Fleta*, c. 9, f. 4. *Quidam sub custodiâ parentum et proximorum consanguineorum, et illis dantur eustodes de jure gentium.* (*c*) And therefore their authority and interest extends only to such things as may be for the benefit and advantage of the infant. Co. Lit. 89 a. [So in the Roman law, the *potestas*, or authority of the tutor, was exercisable only for the benefit of the minor.] (*d*) In the civil law they are called *curators* or *guardians*. Swinb. 194. [The *curators* were not appointed, except in particular cases, till the minor attained the age of puberty. Before that time he was under the care of persons called *tutores*.]

Under this head we shall consider,

(A) The several kinds of Guardians : And herein,

1. *Of the several Kinds of Guardians by the Common Law.*
2. *Of Guardians by Custom.*
3. *Of Guardians by Statute.*
64. *Of Guardians ad litem.*

(B) What Persons may be Guardians.

(C) By what Authority Guardians are appointed : And herein of the proper Jurisdiction in restraining and punishing Abuses by Guardians and others, in relation to Infants.

(A) The several Kinds of Guardians.

(D) Of the Manner of appointing and admitting a Guardian.

(E) At what Time the Authority of a Guardian ceases, and what Acts will determine it.

(F) Of the Guardian's Interest in the Body and Lands of the Ward, and his Remedy for the same.

(G) What Things a Guardian may lawfully do, and will bind the Infant.

(H) Of the Infant's Remedy against his Guardian for Abuses by him.

(I) Of obliging a Guardian to account, and what Allowances he shall have.

(A) The several Kinds of Guardians: And herein,

1. *Of the several Kinds of Guardians by the Common Law.*

THERE are four (*a*) kinds of guardians by the common law, viz., guardian in chivalry, socage, nature, and nurture.

Co. Lit. 88 b. (*a*) There is a guardian in chivalry and guardian in socage; and again guardian in chivalry is twofold, guardian *in droit*, that is to say in his own right; and guardian *in faith*; as where the king or lord assigneth over the custody to another; also both these are either guardians by right, or guardians by claim and possession without right: likewise guardian in socage is twofold, viz. guardian by right, who is called *tutor proprius*; and guardian by possession and claim, who is called *tutor alienus*. 2 Inst. 305.

1. As to guardian in chivalry, it is to be observed, that by the common law, if tenant by knights-service had died, his heir male being under the age of twenty-one years, the lord should have the land holden of him till such heir had arrived at that age, because till then he was not intended to be able to do such service; and such lord had likewise the custody of the body of the infant to breed him up and inure him to martial discipline, and was therefore called guardian in chivalry.

•Lit. § 103; Co. Lit. 74, 75; 2 Inst. 12, 13.

So, if an heir female were unmarried, and under fourteen at her ancestor's death, the lord was guardian till she arrived at that age. Also by Westm. 2, c. 22, the lord should have had the land till she were sixteen, to tender convenable marriage to her; and if the lord died within the two years, the law gave the same interest to his executors and administrators.

Co. Lit. 76.

Wardship was due to the lord in respect to the tenure; therefore, if the lord had released his seigniorship to his ward, or the seigniorship had descended to him, he should have been out of ward, for *cessante causâ cessat effectus*.

Co. Lit. 75 a; 2 Roll. Abr. 36.

An heir who had been in ward by reason of a tenure *in capite*, when he came of age, must have sued livery, i. e. to have had the lands delivered to him by the king, the expense of which was half a year's profit of his lands holden. But, if the heir had been of age at his ancestor's death, he should have paid for land in possession a year's profit for the king's primer seisin and livery; and for reversions expectant on freeholds half a year's profit. And the king should have had all the mesne profits till tender of livery were made. So, if a tender were made, and not duly pursued.

Co. Lit. 77 a.

By the statute of (*b*) Merton, c. 6, if the lord disparaged his male (*c*) ward under fourteen, he should have lost the ward, and the whole profit thereof should have been converted to the ward's benefit. The lord was

(A) The several Kinds of Guardians.

said to disparage the heir by marrying him to the daughter of a villain, burgess, one attainted of felony, to a bastard, or alien, one wanting hand or foot, deformed, paralytic, consumptive, &c.

Co. Lit. 80. (b) On this statute Littleton holds, that no action could be brought, because none was ever brought. Lit. § 108.—And the reason hereof, says my Lord Coke in his comment, is *quia periculosum existimandum est, quod bonorum virorum non comprobatur exemplo*; not, says he, that a statute can be antiquated, but it may be expounded by non-use. Co. Lit. 81 b. [See Hargr. note on this passage.] (c) But there never was any forfeiture of the marriage of an heir female. Co. Lit. 82 b.

On the death of guardian by knights-service, the executors should have had the wardship of the heir, for they had it to their own use, and might have granted or assigned it over; and therefore were not at all accountable to the infant when he came of age.

Co. Lit. 90.

But this sort of guardianship being a sort of dominion of masters over servants and vassals, introduced among the Gothic nations to breed them to arms; it was deemed a great burden, and therefore is now fallen by the 12 Car. 2, c. 24, by which all tenures by knights-service, and socage *in capite*, are turned into common socage, and discharged of homage, livery, primer seisin, wardship, &c., which were at law incident to such tenures, and *aids pur file marrier et pur faire fitz chevalier*.

[See Mr. Hargrave's note on this species of guardianship, Co. Lit. 74 b, n. 11, 13th edit.]

2. By the common law, if tenant in socage die, his heir being under fourteen, whether he be his issue, or cousin male or female, the next of blood to the heir, to whom the inheritance cannot descend, (a) shall be guardian of his body and land till his age of fourteen. And although the nature of socage tenure be in some measure changed from what it originally was, yet it is still called socage tenure, and the guardian in socage is still only where lands of that kind (as most of the lands in England now are) descend to the heir within age. And though the heir after fourteen may choose his own guardian, who shall continue till he is twenty-one, yet, as well the guardian before fourteen, as he, whom the infant shall think fit to choose after fourteen, are both of the same nature, and have the same office and employment assigned to them by the law, without any intervention or direction of the infant himself; for they were therefore appointed, because the infant, in regard of his minority, was supposed incapable of managing himself and his estate, and, consequently, they derive their authority, not from the infant, but from the law; and that is the reason they transact all affairs in their own name, and not in the name of the infant, as they would be obliged to do, if their authority were derived from him.

Co. Lit. 87. (a) [See 1 P. Wms. 260; 9 Mod. 142; Hargr. Co. Lit. 87 b, n. 6.]

Hence the law has invested them not with a bare authority only, but also with an interest till the guardianship ceases; and to prevent their abuse of this authority and interest, the law has made them accountable to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit; and therefore, they are not to have any thing to their own use, as the guardian in *chivalry* had.

Co. Lit. 90 a.

3. Guardian by nature, who is the father or mother. And here we must observe, that by the common law every father hath right (b) of guardianship



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of the body of his son and (c) heir, until he attain to the age of (d) twenty-one years.

Co. Lit. 84; 9 E. 4, 53; 27 Ass. pl. 73; 33 H. 6, 55; Rast. Ent. 263. *β* The father of infant has no authority, as natural guardian, to lease the infant's lands. *May v. Calder*, 2 Mass. 55.*g* (b) The father being guardian in socage shall account with the son for the profits; for otherwise it would be more for the son's advantage to have another for his guardian, than his father. Co. Lit. 88.—And the true reason of guardianship is not with respect to the benefit of the lord by tenure, but with respect to the good education of the infant. Carth. 386.—But, where the father had the custody of the body of his heir apparent, in respect of his natural right, he should render no account to the heir; for what the father might receive on such account, would otherwise have belonged not to the heir, but to the guardian in knights-service. Co. Lit. 88. (c) The true reason why, by the law of England, the father hath not the guardianship of his younger children, is, because by our law the younger children cannot inherit any thing from their father. Carth. 386, *per* Holt, C. J. (d) The guardianship of the father, which is a guardianship by nature, continues till the son and heir apparent attain to the age of twenty-one years, but that is with respect to the body only. Carth. 386, *per* Holt. *β* After the death of their father, the mother is guardian by nature of her infant children; but when she afterwards marries, this guardianship devolves upon her husband. *Freto v. Brown*, 4 Mass. 675. The mother of a bastard child is his natural guardian. *Wright v. Wright*, 2 Mass. 109; *The Inhabitants of Somerset v. The Inhabitants of Dighton*, 12 Mass. 383.*g*

And therefore, when tenures in knights-service were in being, the guardian in chivalry could not have the custody of the body of the heir as long as the father was living; but all which such guardian could have, was the custody of the lands which were descended to the infant from his mother or other collateral ancestor; and therefore, the father had an action of trespass for taking away his son and heir, *quare filium et hæredem rapuit*, though he was not in propriety of speech counted the (a) guardian.

3 Co. 37; *Ratcliffe's case*, Co. Lit. 75, 84; *Dyer*, 189; *Vaugh.* 180. (a) And therefore the writ *de custodiâ terræ et hæredis* did not lie, because the father was not complete guardian. *Fitz. tit. Garde*, 32.

But neither the mother, nor any collateral ancestor, could have had the custody of their heir apparent before the lord; for though they may have an action of trespass *quare consanguineum et hæredem rapuit*, yet they can have it only against a stranger, and not against guardian in chivalry.

Lit. § 114; Co. Lit. 84. [See *Mr. Hargr. Co. Lit.* 74 b, n. 12.] *β* At common law, the mother, as guardian by nature or for nurture, has no control over the estate or contract of her infant child. *Kline v. Beebe*, 6 Conn. 494.*g*

4. Guardian by nurture, who hath only the care of the person and education of the infant, and hath nothing to do with his lands merely in virtue of his office; for such guardian may be, though the infant hath no lands at all, which a guardian in socage cannot.

Co. Lit. 88. [As to guardianship by nurture, *Mr. Hargrave* observes, that it only occurs where the infant is without any other guardian; and none can have it except the father or mother. 8 E. 4, 7 b; *Br. Guard.* 7; 3 Co. 38. It extends no farther than the custody and government of the infant's person, and determines at fourteen, in the case both of males and females. Lord Chief Baron *Comyns* indeed refers to *Fleta*, as if, according to that ancient book, grandfathers and great grandfathers might be guardians by nurture; 3 *Com. Dig.* 421; but the passage cited doth not point at this species of guardian, it describing the *patria potestas* in general, and being apparently borrowed from the text of the Roman law; nor will it bear the least application to guardianship, as our own law regulates it. *Hargr.* note 13; *Co. Lit.* 119 b.]

## 2. Of Guardians by Custom.

By the custom of the city of London, the custody and guardianship of orphans, under age, unmarried, belongs to the city.

But for this, vide tit. *Customs of London*, letter (B).

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By the custom of Kent, where any tenant died, his heir within age, the lord of the manor might and did commit the guardianship to the next relation in the court of justice, within whose jurisdiction the land was; but the lord was bound on all occasions to call him to an account; and if he did not see that the accounts were fair, the lord himself was bound to answer it. This province the chancellor hath taken from inferior courts since the conquest, only in Kent, where these customs are continued. But the custom is not used even in Kent at this day, because the lords in giving tutors do it at their own peril in the account; and therefore every man thinks it dangerous to intermeddle.

Lamb. 611, 612, 624, 625.

This guardian appointed by the lord is to have the same allowance, and no other, with the guardian in socage at common law, and is subject, as has been said, to the account of the heir for his receipts, and to the distress of the lord for the same cause.

Lamb. 624.

If copyhold lands descend to an infant within the age of fourteen years, the next of kin, to whom the lands cannot descend, shall be guardian both of the infant's land and estate, if by the custom of a manor the guardianship does not belong to another.

2 Roll. Abr. 40; 2 Lutw. 1188, S. P. said to be resolved.

And therefore if a copyhold descend to a lunatic, or an infant within the age of fourteen, the lord, without a special custom for that purpose, hath no power of appointing a guardian.

Hob. 215; Hut. 16, 17; 2 Lut. 1188.

3. *Of Guardians by Statute.*

By the common law, no person could appoint (a) a guardian, because the law had appointed one, whether the father was tenant by knights-service or in socage.

3 Co. 37; 3 Inst. 62. (a) But by common law, tenant in socage of age might have disposed of his land by deed, or last will, in trust for his heir; but not the custody and tuition of his heir, for the law gave that to the next of kin to whom the land could not descend. Vaugh. 178.

The first statute that gave the father a power of appointing, was the 4 & 5 P. & M. c. 8, by which it is enacted, "That it shall not be lawful for any person or persons to take or convey away, or cause to be taken or conveyed away, any maid or woman-child unmarried, being under the age of sixteen years, out of or from the possession, custody, or governance, and against the will of the father of such maid or woman-child, or of such person or persons, to whom the father of such maid or woman-child by his last will and testament, or by any other act in his lifetime, hath or shall appoint, assign, bequeath, give, or grant, the order, keeping, education, or governance of such maid or woman-child, except," &c.

In the construction of this statute it hath been holden, that if two persons are appointed guardians by authority of this statute, and one of them dies, the guardianship will not survive, because the statute gives an authority to a special purpose, and makes the ravisher criminal within the words of it; and being a penal law ought to be construed strictly.

Poph. 204; Lord Bray's case, Dy. 89; Gilb. Eq. Rep. 176.  $\beta$  When it can be clearly collected from the will of the father that certain persons are to have the custody of the person and estate of his children, until they arrive of age, such an appointment

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will be held to constitute them guardians, as though the testator had used proper terms. *Peyton v. Smith*, 2 Dev. & Bat. Eq. 325.*g*

The 12 Car. 2, c. 24, § 8 enacts, "That where any person hath or shall have any child or children under the age of one-and-twenty years, and not married at the time of his death, it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time *in ventre sa mere*, or whether such father be within the age of one-and-twenty years, or of full age, by deed executed in his lifetime, or by his last will and testament in writing, in the presence (a) of two or more credible witnesses, in such manner, and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of one-and-twenty years, or any lesser time, to any person or persons in possession or remainder, other than popish recusants; (b) and that such disposition of the custody of such child or children, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage, or otherwise; and that such person or persons to whom the custody of such child or children hath been or shall be disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass against any person or persons which shall wrongfully take away or detain such child or children, for the recovery of such child or children; and shall and may recover damages for the same in the said action, for the use and benefit of such child or children."

(a) || Though the appointment be by an unattested will, yet, if a codicil duly attested adopt the will, it will amount to a re-execution, and re-publication of it, and make the appointment good. *De Bathe v. Lord Fingal*, 16 Ves. 167. || (b) [Other persons are also disabled. See the 9 & 10 W. c. 32, and the statutes relative to the qualifications of officers. See also *Swinb.* part 3, § 10.]

§ 9. "And that such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements, and hereditaments of such child or children, and also the custody, tuition, and management of the goods and chattels and personal estate of such child or children, till their respective age of one-and-twenty years, or any lesser time, according to such disposition aforesaid, and may bring such action or actions in relation thereto, as by law a guardian in common socage might do."

In the construction of this statute the following opinions have been holden :

1. That a testamentary guardian, or one formed according to this statute, comes *in loco parentis*, and is the same in office and interest with a guardian in socage, and differs only as to the *modus habendi*, or in a few particular circumstances; as first, that the guardianship may be holden for a longer time, viz., till the heir attains the age of twenty-one, where before it was but to fourteen. Secondly, it may be by other persons holden: for before it was, the next of kindred not inheritable could have it; now, who the father names shall have it.

Vaugh. 179; 2 Wils. 129; 2 P. Wms. 115.

2. That though neither before nor since this statute a person under age may devise his lands, yet a person under age may, within this act, dispose of the custody of his child, and such disposition draws after it the land, &c., as incident to the custody.

Vaugh. 178. [But though a testamentary guardian shall have the custody of the

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infant's real estate, a lease granted by him of such estate is absolutely void. *Roe v. Hodgson*, 2 Wils. 129, 135. See *Shaw v. Shaw*, Vern. and Scriv. 607.]

3. That an infant hath the same remedy against a testamentary guardian as he had against a guardian in socage, though the statute speaks only of remedies for the guardian.

Vaugh. 179.

4. If the father being of age devise his lands to J S during the minority of his son and heir, in trust for his heir, and for his maintenance and education until he be of age, this is no devising the custody within this statute, for he might have done this before the statute.

Vaugh. 184.

5. If a man devise the custody of his heir apparent to J S, and mention no time, either during his minority, or for any other time, this is a good devise of the custody within the act, if the heir be *under fourteen* at the death of the father; because by the devise, the *modus habendi custodiam* is changed only as to the person, and left the same as it was as to the time. But, if *above fourteen* at the father's death, then the devise of the custody is merely void for the incertainty; for the act did not intend every heir should be in custody until one-and-twenty, *non ut tamdiu, sed ne diutius*; therefore he shall be in this custody but so long as the father appoints; and if he appoint no time, there is no custody.

Vaugh. 184, 185.

|| 6. That a father may dispose by will of the guardianship of children born and *to be born*, including children by a second wife.

*Ex parte* Earl of Ilchester, 7 Ves. 318.

And he may do so merely on petition to appoint a guardian; for it is as if he had never been appointed. But where a testamentary guardian has once taken the trust upon him, and acted as guardian, if it be sought to remove him, a bill must be filed.

*O'Keefe v. Casey*, 1 Sch. & Lefr. 106. Vide *Ex parte* Salter, 3 Br. Ch. Rep. 500.]

[7. That as the statute declares the guardianship shall continue till twenty-one, if so prescribed by the father, it shall not be determined sooner even by the marriage of the infant.

*Mendez v. Mendez*, 3 Atk. 625; 1 Ves. 91.]

8. That this testamentary guardian hath the custody not only of the lands descended or left by the father, but of all lands and goods any way acquired or purchased by the infant, which the guardian in socage had not.

Vaugh. 185, 186.

9. That this guardian cannot assign or transfer the guardianship over to another, neither shall it upon his death go to his executors or administrators; for though it be an interest, yet it is an interest joined with a trust, which the testator might think those persons incapable of executing, though he placed that trust and confidence in the guardian himself. But it seems, that if two or more are made guardians, and one of them dies, the survivor or survivors shall continue guardians; for from the nature of the thing the authority must be joint and several. Also, were it otherwise, the more guardians were appointed for the security of the infant, the less secure he would be, because upon the death of any one of them the guardianship would be at an end.

Vaugh. 181; *Mellish v. De Costa*, 2 Atk. 15; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 104.

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10. That if a person, appointed guardian pursuant to this statute, die or refuse to take upon himself the guardianship, the lord chancellor may appoint a proper guardian.

Abr. Eq. 260.

11. Also, if a person, appointed guardian pursuant to this statute, becomes a lunatic, or is otherwise incapacitated to execute the trust reposed in him; or if he abuses the trust, by doing any thing prejudicial, either to the person of the infant, or his estate; it seems, that the Court of Chancery may either totally remove him, and appoint another guardian, or else impose such terms on him, by obliging him to give security, &c., as will effectually hinder him from doing any thing prejudicial to the infant. But in what particular instances of this kind a court of equity will interpose, does not seem to be clearly agreed. (a)

Vide 2 Chan. Ca. 237; 3 Chan. Rep. 58; 2 Sid. 424; Vern. 442; Abr. Eq. 260, 261. [1 P. Wms. 704; 1 Ves. 160. *Ex parte* Lady Ann Brydges, H. T. 1791. (a) It would not remove a mother on account of her being married to a second husband, even though she be devisee in the remainder of the real estate, in case the infant ward should die without issue. *Morgan v. Dillon*, 9 Mod. 135; 3 Br. P. C. 341; *Melish v. De Costa*, 2 Atk. 15. See too 1 Woddes. 461.] || The chancellor has upon the application of an infant, and consent of his relations and guardians, appointed other persons to have the care of him till further order. *Spencer v. Earl of Chesterfield*, Ambl. 146. ||

12. That a copyholder is not within this statute to dispose of the custody of his infant heir, because of the meanness of his estate, and the prejudice that would accrue to the lord of the manor; and therefore the lord, or those entitled by the custom, shall have the custody of him.

3 Lev. 395, *Clench and Cudmore*. || This report by Levinz is very short and inaccurate. There is a fuller and more correct account of the case under the name of *Church v. Cudmore*, in *Lutw.* 1187. The points resolved were three:—1st, That the lord hath no power by the common law, or without a special custom, to assign the guardianship of an infant copyholder within his manor. 2dly, That in the case then before the court such custom was well alleged upon the pleadings. 3dly, That this statute doth not destroy the validity of such custom, nor extend to a copyhold, for the prejudice that it would work to the lord. So far, then, from the court's determining, as stated by Levinz, that a copyholder is not within this statute to dispose of the custody of his infant heir, the inference from this determination would seem to be, that he is within it, where there is no custom giving the appointment to the lord. There is a short account of this case at the end of the report of *Wade v. Baker*, in 1 *Ld. Raym.* 132, which expressly states, that the lord claimed *by the custom as guardian*, and adjudged for the lord that this customary right was not taken away by the statute. And in the above case of *Wade v. Baker*, the bar to the consuance that the mother entered as guardian in socage was adjudged to be ill, because the mother could not be guardian in socage, there being, said the court, in this case, a particular custom for the lord to have the custody, *which custom is not denied*. So, in *Egleton's case*, 2 *Roll. Abr.* 40, if a copyhold descend to an infant within the age of fourteen, his *prochein ami*, to whom the land cannot descend, shall have the custody of the copyhold as well as the freehold, unless there be a custom appointing it to another. It has accordingly been determined in a late case, that the mother of an infant copyholder under fourteen, is the guardian of his copyhold where there is no custom for appointing a guardian, and as such entitled to occupy the same irremovably. *R. v. Wilby*, 2 *M. & S.* 504. ||

[13. Though a natural daughter hath been holden to be within the statute of 4 & 5 P. & M. c. 8, yet natural children are not within this statute. But though not within this last statute, the Court of Chancery will adopt the nomination of the father, without referring it to a master, unless some objection be stated to the person named by the father. And though a (b) grandfather cannot appoint a testamentary guardian for his

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grandson, yet if he leave him an estate upon that condition, and the father do not submit to it, it will work a forfeiture.

Rex v. Corneforth, 2 Str. 1162; Ward v. St. Paul, 2 Br. Ch. Rep. 583, and Peckham v. Peckham, there cited. Since reported in 2 Cox's Rep. 46. (b) Blake v. Leigh, Ambl. 306.

14. An appointment of a testamentary guardian by a mother is absolutely void.

Vaugh. 180. *Ex parte* Edwards, 3 Atk. 519.

15. If a father dispose of the custody of an infant by deed, such disposition may be revoked by will. But, if there be a covenant in the deed, (a) that the father will not revoke it, a court of equity will not set it aside unless the trust be abused.

Ld. Shaftesbury v. Hannam, Finch's Rep. 323. (a) Lecone v. Sheires, 1 Vern. 442.]

|| 16. An appointment of a guardian under this statute is not revoked by a subsequent testamentary appointment, not executed according to the statute, and not directly importing revocation.

*Ex parte* Earl of Hechester, 7 Ves. 348.||

[17. As the statute prescribes no particular form of appointment, it is immaterial by what words the guardian is appointed, provided the father's intent be sufficiently apparent.

Swinb. p. 3, c. 12.]

And *note*, that both by the 4 & 5 P. & M. c. 8, and by this statute, there are express savings with respect to the city of London and other towns as to the custody of orphans.

Sid. 363.

|| This statute extends to Ireland.

Lord Anglesey v. Lord Ossory, 3 Keb. 528.||

β M, by will, appointed N guardian of his children and executor, and died. N qualified as executor, but did not take upon himself the duties of guardian; and, after acting as executor of the will six years, renounced the guardianship. O was appointed guardian and receipted in full to N for the entire estate. Held, that the appointment of O was legal and valid, and that though N was named guardian by the will, and may have done an act appropriate to the character of guardian, that did not make him such.

Mohawk Bridge Company v. Utica and Schenectady R. R. Company, 6 Paige, 554.g

(B) 4. Of Guardians *ad litem*.

A guardian *ad litem* is one appointed for the infant to defend him in an action brought against him. Where an infant is sued in a civil action, every court where such suit is pending has power to appoint a guardian *ad litem*, when he has no guardian, for as an infant cannot appear by attorney he would be without assistance if such guardian were not appointed. The power and duties of guardians *ad litem* are confined to the defence of suits.

F. N. B. 27; Co. Lit. 88 b, note (16); Ibid. 135 b, note (1); Larkin v. Mann, 2 Paige, 27; Wood v. Wood, 2 Paige, 108; Knickerbacher v. De Freest, 2 Paige, 304; Ontario Bank v. Strong, 2 Paige, 301; Union Insurance Company v. Van Ransselaer, 2 Paige, 85; Roberts v. Stanton, 2 Munf. 129; Lushington v. Sewell, 6 Mad. 28; Banta v. Calhoun, 2 A. K. Marsh. 167; Mason v. Dennison, 15 Wend. 64; Fox v. Cosby, 2 Call, 1; Chapman v. Turberville, 4 Hen. & M. 482; Wills v. Winfree, 2 Munf. 342; Beverleys v. Miller, 6 Munf. 99.

In Pennsylvania a *prochien ami* is recognised in the nature of a guardian *ad litem* in certain cases, but not as guardian or trustee in matter *in pais*.

Turner v. Partridge, 3 Penns. 172.g

## (B) What Persons may be Guardians.

HERE, in the first place, we must take notice, that there can be no guardian in socage but where lands of that nature descend to the heir, ||and also where his estate is legal.

Co. Lit. 88; 2 Mod. 176; R. v. Toddington, 1 B. & A. 560.||

Therefore if a man die seised of a rent-charge, common, or suchlike inheritances, which lie not in tenure, and dispose not of the custody of his child, the heir may choose his guardian. If he be so young that he can make no choice, it is most fit that his next cousin, to whom the inheritance cannot descend, should have the custody of him, and whoever takes the rent, &c., is chargeable in account. But, if he have any socage-land, the socage-guardian shall take the rent-charges, &c., in his custody.

Co. Lit. 87.

So, the wife's heir shall not be in ward during the life of tenant by the curtesy, because by his continuance of his wife's estate the descent to the heir is interrupted.

F. N. B. 143.

By our law the next of blood, to whom the inheritance cannot descend, is entitled to the guardianship; as, if the land descend from the father, the mother, or next cousin to the mother's shall be guardian in socage; *et sic e converso*, where lands descend from the mother. But the (a) civil law appoints him to be a guardian that is to inherit next, which our law says is *committere ovem lupo*.

Co. Lit. 87. This seems to have been the common law, and is confirmed by 28 E. 1, c. 1; Goodtitle v. Newman, 3 Wils. 516. (a) The rule in the civil law is, *ubi successionis emolumentum, ibi et tutelæ onus esse debet*.

If the younger brother die seised in tail, leaving issue under fourteen, the elder, not the middle brother, shall be his guardian in socage, for in equal degree the law prefers him.

Co. Lit. 88.

But, if tenant in tail have no brother or sister, and die, leaving issue under fourteen, the next cousin of the father's or mother's side that first seizes the heir, shall have the custody of him; for the relation on both sides is equal, and no cause appears wherefore either should be preferred; and he that first takes care of the heir shows himself to be most concerned for his interest.

Co. Lit. 88.

But, if donees in frank-marriage die, their issue being under fourteen, the next cousin of the part of the donee that was the cause of the gift (being not inheritable to the donor's reversion) shall have the custody.

Co. Lit. 88.

A, seised of some lands as heir to his father, and of others as heir to his mother, dies, leaving issue under fourteen: the next cousin of either side, that first seizes the body of the heir, shall have the custody of him; and the next cousin of the father's part shall enter into the lands of the mother's part, *et sic e converso*.

Co. Lit. 88 b.

If a woman hath issue a son by a former husband, and she marries a second husband, seised of socage land by whom she has issue another son, and the husband and the wife die, leaving issue the said son under the age

## (B) What Persons may be Guardians.

of fourteen, his brother of the half-blood shall be guardian in socage (a), as next of kin to whom the inheritance cannot descend.

Cro. Eliz. 825; 2 And. 171; Moore, 635; 2 Jon. 17. (a) That the elder brother of the half-blood shall not be guardian in socage to the younger brother, being heir to the father of borough-english lands; for the rule is, that no person, who can by any possibility inherit, shall be guardian. Co. Lit. 88.

β Infants took lands by descent, two-thirds of which were held by their father in free and common socage, and the other third in allodium; held that the mother was entitled to the custody of the children, and to the care of the lands as guardian in socage.

Putnam v. Ritchie, 6 Paige, 390. See Holmes v. Seely, 17 Wend. 75; Jackson v. Combs, 7 Cowen, 36; Byrne v. Van Hoesen, 5 Johns. 66.

In New Jersey, a mother is entitled to the guardianship of her infant child after the father's death, unless some strong reasons render the appointment improper.

Eldridge v. Lippincott, 1 Coxe, 397.g

If A be guardian in (b) socage B under fourteen, he shall be guardian in socage of another infant, whom B ought to be guardian of, as being his next cousin *pur cause de gard*, and an action of account lies against him.

Co. Lit. 88 b. β Guardianship in socage strictly continues only till the ward shall arrive at the age of fourteen years, but it continues after that age when no other guardian is appointed. 7 Cowen, 36; Byrne v. Van Hoesen, 5 Johns. 66.g (b) But a testamentary guardian, pursuant to the 12 Car. 2, c. 24, though his ward happens, as next of kin, to be entitled to the guardianship of another infant, shall not be guardian *pur cause de gard*; for he is neither an hereditament, nor goods, nor chattels of the first infant. Vaugh. 184. β In New York, a father cannot be guardian in socage for his child. Jackson v. Combs, 7 Cowen, 36.g

An infant, idiot, lunatic, *non compos*, one blind and dumb, deaf and dumb, or leper removed, cannot be guardian in socage.

Co. Lit. 88 b.

β Fixed habits of intemperance constitute a sufficient reason for the removal of a guardian.

It is improper that the wife of a man addicted to such habits should be guardian, she being subject to his control.

An adult husband is entitled to the guardianship of the person of his wife during her minority.

Kettletas v. Gardner, 1 Paige, 488. But see Matter of Whitaker, 4 Johns. 378.

The court will not appoint any of its officers, as such, to act as guardian, nor appoint any person without his written consent.

M'Vickar v. Constable, Hopk. 102.

As between the uncle and a stranger, other things being equal, the uncle is to be preferred as a guardian. The common law rule of guardianship in socage never prevailed in Chancery.

Morehouse v. Cooke, Hopk. 226.

The husband of the widow and administratrix may be appointed guardian of his step-child, but not unless the estate of the infant's father has been entirely settled.

Deborah Stewart's case, 1 Browne's R. 288.

When a husband dies leaving a widow and infant children, and she enters upon the land of which her husband was possessed, it will be intended that she is in possession by right, and that she entered as guardian in socage,



## (C) By what Authority Guardians are appointed.

when the entry and perception of the profits are unaccompanied by acts or declarations inconsistent with that character.

Stillwell v. Mills, 19 Johns. 304; Byrne v. Van Hoeson, 5 Johns. 66; Jackson d. Youngs v. Vredenburg, 1 Johns. 159; Jackson d. Davy v. De Watts, 7 Johns. 157.g

(C) By what Authority Guardians are appointed: And herein of the proper Jurisdiction in restraining and punishing Abuses by Guardians, and others in relation to Infants.

It is clearly agreed, that the king, as *pater patrie*, is universal guardian of all infants, idiots, and lunatics, who cannot take care of themselves; and as this care cannot be exercised otherwise than by appointing them proper curators or committees, it seems also agreed, that the king may, as he hath done, delegate that authority to his chancellor; and that therefore, at (a) this day, the Court of Chancery is the only proper court which hath jurisdiction in appointing and removing guardians, and in preventing them and others from abusing their persons or estates.

2 Inst. 14; 4 Co. 126. Beverley's case, and in Staundf. Præ. 37, it is said, that the king has the protection of all his subjects, and of all their goods, lands, and tenements; and so of such as cannot govern themselves, nor order their lands and tenements, his grace, as father, must take upon him to provide for them, that they themselves and their things may be preserved. (a) Also, it seems, that when tenures were in being, and till the court of wards was erected, the whole jurisdiction of the king's wards, where the lands were holden in chivalry or knight's service, was under the jurisdiction of the Court of Chancery. So, likewise, in relation to subjects, this court determined touching the wardships of the body, who was the prior and who was the posterior lord.—And in Palm. 252, it is said, that if a guardian be made by writ out of Chancery, or by the direction of the court, his authority cannot be revoked by the infant, but that that court will make him answer for any act of his to the prejudice of the infant.—[This jurisdiction of the Court of Chancery, in the case of infants, Mr. Hargrave conceives to have originated in usurpation, the arguments in general adduced in its support being very weak and insufficient, and its commencement of a very late date. Co. Lit. 128, note 16. But see a very able attempt to rescue it from this aspersion, by the learned and spirited annotator on the *Treatise of Equity*. Fonbl. Eq. Tr. 228, note a.]

And as the Court of Chancery is now invested with this authority, hence in every day's practice, we find that court determining as to the right of guardianship, who is the next of kin, and who the most proper guardian (b); as also orders made, on petition (c) or motion, for the provision of infants during any dispute herein; as likewise guardians removed or compelled to give security; they and others punished for abuses committed on infants, and effectual care taken to prevent any abuses intended them in their persons or estates; all such wrongs and injuries being reckoned a contempt of that court, (d) that hath, by an established jurisdiction, the protection of all persons under natural disabilities.

2 Mod. 177; 1 Eq. Cas. Abr. 260; Gilb. Eq. Rep. 172; 8 Mod. 214; 9 Mod. 116, 135. [Pre. Ch. 106; 2 Ld. Raym. 1334; 1 P. Wms. 703; 2 P. Wms. 112, 561; 3 P. Wms. 116, 118, 154; 1 Vern. 442; Cas. temp. Talb. 58; 1 Stra. 168; 2 Stra. 982; 3 Atk. 305. (b) A guardian appointed by the court is competent to consent to the marriage of an infant. *Ex parte Birchell*, 3 Atk. 813.] || The court will, upon petition, appoint a guardian for the mere purpose of consenting to the marriage of a female infant, though she has no property. *In re Woolcombe*, 1 Madd. 213. But see what is said by Lord Hardwicke in *Ex parte Birchell*, *ubi supra*.] [But a petition, that a guardian may be assigned, unless to carry on a suit or protect an interest, must be pursuant to the statute. *Ex parte Beeher*, 1 Br. Ch. Rep. 556. (c) It is now settled that an order of maintenance may be made upon a petition without a bill, though a different practice seems to have once prevailed. *Ex parte Kent*, 3 Br. Ch. Rep. 88. *Ex parte Salter*, *Ibid.* 500. In allowing maintenance the court will attend to the circumstances and

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state of the family; as, where there is an elder son, and younger children who have no provision, it will allow a more ample maintenance to the guardian of the eldest son, that he may be enabled to maintain the younger children. *Hervey v. Hervey*, 2 P. Wms. 21; *Pierpoint v. Lord Cheney*, 1 P. Wms. 493; *Petre v. Petre*, 3 Atk. 511; *Roach v. Garvan*, 1 Ves. 160. And it will in some cases allow the principal to be broken in upon for the maintenance of the infant. *Barlow v. Grant*, 1 Vern. 255; *Hervey v. Hervey*, 2 P. Wms. 21. (d) If a man marry a ward of the court without consent, he will be committed, though it should appear that he did not know that she was so; *Herbert's case*, 3 P. Wms. 116; and there must be a proper settlement made on the wife before the contempt can be cleared. *Stevens v. Savage*, 1 Ves. jun. 154.]

[This court will interpose, too, even against that authority and discretion which the father hath in general in the education and management of his child: *à fortiori*, it will interpose against persons who derive their whole authority from the father; and therefore, although it cannot remove a testamentary guardian, or consider his conduct as a contempt, unless the infant be a ward of the court, (a) yet it may impose such restrictions as will prevent him from prejudicing the interests of the ward. (b)]

*Duke of Beaufort v. Bertie*, 1 P. Wms. 702; *Butler v. Freeman*, Ambbl. 302; *Lord Shaftesbury's case*, 2 P. Wms. 117, and *Potts v. Norton*, in note (1) 110, of Mr. Coxe's edition of that book. *Powell v. Cleaver*, 2 Br. Ch. Rep. 499. But *qu.* if such child should not be a ward of the court? *Ex parte Warner*, 4 Br. Ch. Rep. 101. (a) *Goodall v. Harries*, 2 P. Wms. 561. (b) *Foster v. Denny*, 2 Ch. Ca. 237; *Roach v. Garvan*, 1 Ves. 160.]

But it is clear, that the Ecclesiastical Court hath not any jurisdiction with regard to a guardian in socage, or testamentary guardian; and therefore, where Sir Henry Wood having devised the guardianship of his daughter, by his will in writing, according to the 12 Car. 2, c. 24, to the lady Chester his sister; the Duchess of Cleveland, to whose son this daughter, being about eight years old, was contracted, pretending that Sir Henry Wood by word revoked this disposition of the guardianship, sued in the prerogative court to have this nuncupative codicil proved; the court granted a prohibition; for they are not to prove a will concerning the guardianship of a child, which is a thing of a temporal nature, and of which the courts at Westminster are to judge, whether it be pursuant to the statute or not.

Vent. 207, *Lady Chester's case*. [The right also of appointing guardians of the personal estate, and if there is no other guardian by tenure or otherwise, of the person, is claimed by the ecclesiastical courts, and seems warranted, within the province of York, by immemorial custom. *Swinb.* 210; 4 *Burn's E. L.* 102. This claim, however, hath in modern times been treated as a presumption, and their power hath been confined merely to the appointment of guardians *ad litem*. 3 Atk. 631; 3 *Bur.* 1436; *Co. Lit.* 88 b, n. 16.]

[When, from a defect of the law, the infant finds himself wholly unprovided with a guardian, he may elect one himself. This may happen, either before fourteen, when the infant has no property such as attracts a guardianship by tenure, and the father is dead without having executed his power of appointing a guardian for his child, and there is no mother; or after fourteen, when the custody of the guardian by socage terminates, and from the want of the father's appointment there is no other ready to succeed to the trust, and to take care of the infant or his property.

*Co. Lit.* 88 b, n. 16.]

β A natural child can have no guardian except by the appointment of the court, but the testator, the putative father, having named his executor the guardian, the lord chancellor appointed the person named.

*Barry v. Barry*, *Moll.* 210.

## (D) Of the Manner of appointing a Guardian.

The power to appoint a testamentary guardian is confined to the father, it does not extend to the grandfather.

*Hoyt v. Hilton*, 2 Edw. 202.*g*

¶ The jurisdiction of the lord chancellor as representing the *parens patriæ*, to control the authority of parents as well as guardians, (from whatever source it may have originated,) as is now firmly established by the decisions.\*

\*See remarks in the Quarterly Review, 1829, No. 77.

The court will interfere to control the parent's authority, on the ground of his being an outlaw, residing abroad in embarrassed circumstances, and the child having an estate in remainder, and also a present maintenance.

*Cruise v. Orby Hunter*, 2 Brown's Chan. R. by Belt, 500.

So also where the father was in Newgate for cruelty to his wife, and had no settled abode, and the relations swore he was unfit to have the management of his children.

*Ex parte Warner*, 4 Brown's Chan. R.

So also on the ground of the father's ill treatment, and cruelty towards the infants.

*Whitfield v. Hales*, 12 Ves. 492.

So also on the ground of the father being an avowed atheist and immoral man, living in adultery.

*Shelley v. Westbrook*, Jacob's R. 267.

And so also if a relation gives by will to a child a fortune, prescribing at the same time a course and plan of education, and the father assents to the child having the benefit of the provision, thereby relieving himself from the expense of education, he will not be allowed to break in on the plan of education imposed by the testator.

*Lyons v. Blenkin*, Jacob's R. 270, *in notis*.

And where the father was a man of immoral and irreligious habits, and was living in adultery with a married woman, Lord Eldon, after full argument, deprived him of the custody and education of his children, and the decision was affirmed by the House of Lords on appeal.

*Wellesley v. Duke of Beaufort*, 2 Russ. R. 1; and see also *Dow's App. Ca. N. S.* 152; *De Manneville v. De Manneville*, 10 Ves. 52; 5 East, R. 221.¶

## (D) Of the Manner of appointing and admitting a Guardian.

It is said, that in Chancery a guardian cannot be otherwise appointed than (a) by bringing the infant into court, or his praying a commission to have a guardian assigned him.

*Abr. Eq.* 260, *Lloyd and Carew*. (a) ¶ The presence of the infant in court has been dispensed with, on an affidavit of his inability to attend, from illness. *Hill v. Smith*, 1 Madd. 290. This court will not appoint a guardian without a reference to the master, unless the property be exceedingly small. *Ex parte Wheeler*, 1 Ves. 266.¶

¶ But to authorize the appointment, it is not necessary that a cause should be depending.

*Mellish v. De Costa*, 2 Atk. 14; *Ex parte Birchell*, 3 Atk. 813.¶

Regularly an infant is to sue both at common law and in Chancery, by his *prochein ami* (b) or guardian; but he must always defend by guardian, who is to be (c) admitted by the court.

Vide head of *Infancy and Age*. (b) That in an ejectment against an infant, the defendant cannot appear, by *prochein ami*, for a guardian and *prochein ami* are distinct, and the suit by *prochein ami* was not before the statute of Westm. 1, c. 47, and Westm. 2,

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c. 15, and is given in case of necessity, where an infant is to sue his guardian, or is eloined, or the guardian will not sue for him. Cro. Ja. 640.—But for the difference between a *prochein ami* and guardian, vide Palm. 296; 2 Inst. 260, 390. (c) For the regularity of such admission, vide 4 Co. 53 b; 2 Inst. 261; Cro. Ja. 641; Palm. 296; Sid. 173, 342, 446; Mod. 48; Vent. 73; 2 Saund. 94; 2 Keb. 627; Lev. 224; 3 Mod. 236; 2 Vern. 342; Pre. Ch. 376; 8 Mod. 25; Fitzgib. 1, 114, 164; 2 P. Wms. 297; 3 P. Wms. 140; 1 Stra. 114, 304, 445; 2 Stra. 1076; Cowp. 128; Co. Lit. 153 b, n. 1.

The respective courts, in which the suit is commenced, must assign a (a) proper guardian to the infant; and therefore if an infant is sued, the plaintiff must move to have a proper guardian assigned him.

Stil. 369; Bridg. 74; Roll. Rep. 303. (a) That the course hath been to allow some of the officers of the court, &c., who by reason of their skill make the best guardians, and *prochein amis* for the advantage of the infant. 2 Inst. 261.—That the court of Chancery may assign one of the six clerks to be guardian to an infant. 2 Chan. Ca. 163.—But, if there be a guardian appointed by the father, or *ex provisione legis*, as guardian in socage, who acts accordingly, he only shall be admitted to sue for the infant, unless he hath misdemeaned himself. Sid. 424, *per* Keling, C. J.—That the court may discharge one guardian and appoint another. Stil. 456.—That a husband can't disavow a guardian made by the court for his wife. Vent. 185. || Where a married woman had been appointed under the master's report the guardian of an illegitimate child, payment was ordered to her upon her separate receipt for the purpose of the order. Wallis v. Campbell, 13 Ves. 517. ||—[A person who is reduced by age or infirmities to a second infancy, may also defend by guardian. Pr. Ch. 429.]

|| If he appears by attorney, the court will, at the instance of the plaintiff, compel an amendment of the appearance by substituting a guardian, with liberty, however, to plead *de novo*.

Hindmarsh v. Chandler, 7 Taunt. 488. ||

And as no infant can bring his bill but by *prochein ami*, so the *prochein ami* must take care of it; for if the bill is dismissed, he must (b) pay the cost thereof.

(b) And therefore any person may bring a bill, as *prochein ami* to an infant without his consent, because it is at his peril that he brings it to be answerable for the event. Abr. Eq. 72, Andrews and Cradock. || And where there are two bills filed by different *prochein amis*, the court will refer them to the master to certify which is the more proper, because it is the duty of the court, as the guardian of infants, to take care that what is done shall be for their benefit. Anon. 3 Atk. 603. ||

Where a bill is brought against an infant, if in town, he must appear in court, and have a guardian assigned him, by whom he may defend the suit; if in the country, he sues out a commission to assign a guardian, (c) and put in his answer; and whether he pleads, answers, or demurs, still it must be done by his guardian; for if it is the plea, answer, or demurrer of the infant, without doing it by the guardian, it will be irregular. (d)

(c) || Where the infant resided in Germany, the court assigned his father, he being not interested in the suit, as his guardian for the purpose of putting in his answer, to avoid the difficulty of a commission. Jongsma v. Pfiel, 9 Ves. 357. (d) Where the mother of an infant defendant appeared as the guardian, though not really so, the court would not set aside the appearance on that ground. Humphrey v. Brewer, Vern. and Scriv. 386. ||

But, where the infant neglect to appear, or to have a guardian assigned, it is a motion of course (he being in contempt to an attachment) to pray for a messenger to bring him into court, and when he is there, the court always assigns him a guardian. But it is (e) doubted, whether this can be done against a peer of the realm who is an infant, and whose person is sacred.

(e) Vide tit. *Privilege*.

|| Where a minor's fortune is small, a guardian may be appointed and maintenance allowed, on petition; but where it is considerable, or it is necessary

(E) At what Time the Authority of a Guardian ceases.

to take accounts before the master, or where trustees are called on to allow a maintenance, a bill must be filed.

*Corbet v. Tottenham*, 1 Ball & Beatty, 60; *Ex parte Wheeler*, 16 Ves. 266; *Ex parte Janion*, 1 Jac. & Walk. 395; *Russell v. Sharpe*, *Ibid.* 483; *Chatteris v. Young*, 1 Jac. & W. 106; 1 Russ. 478.

An appointment of guardian by a will not duly executed, will be made good by a will duly executed written on the same sheet as the will referring to it and confirming it, though with some alterations, for such codicil is a republication and re-execution of the will.

*De Bathe v. Fingal*, 16 Ves. 167.

A mother is not rendered incompetent by her second marriage to be guardian of her children by her first marriage.

1 Ball & B. 60.

If two persons are appointed by the court guardians of an infant during his minority until further order, the guardianship is at an end on the death of one of them, and there must be a new application.

*Bradshaw v. Bradshaw*, 1 Russ. 528.

Where a testamentary guardian has not acted, the mode of proceeding in order to have a guardian appointed is by petition; it is not necessary to file a bill; *secus*, if after acting he has misconducted himself.

*O'Keeffe v. Casey*, 1 Scho. & Lef. 106.

One of three persons who had been jointly appointed guardians of an infant having died, the vice-chancellor, without a reference to the master, appointed the two survivors guardians of the infant.

*Hall v. Jones*, 2 Sim. 41.

The court cannot remove a testamentary guardian, but will appoint a proper person to superintend the infant's education.

*Ingham v. Bickerdike*, 6 Madd. 275.||

(E) At what Time the Authority of a Guardian ceases, and what Acts will determine it.

THE authority of a guardian in chivalry did not determine till the heir, if a male, came to the age of twenty-one years; because it was presumed, that till that age he was not capable of doing knight-service, and attending his lord in the wars. The guardianship of an heir female determined at her age of fourteen at common law, but by Westm. 1, the lord had the wardship till she attained the age of sixteen, to tender her convenable marriage. The authority of a guardian in (a) socage ceases at the age of fourteen, at which age the infant may call his guardian to an account, and may choose a new guardian.

Lit. § 103; Co. Lit. 75; 2 Inst. 135. (a) As to the guardianship of the father, see ante. That committing waste is a forfeiture of the father's guardianship. Hard. 69.

If a guardian in socage die, the guardianship shall go to the next of kin of the infant to whom the inheritance cannot descend, and shall not go to the executors of the guardian, because they can take nothing but what the testator had to his own use. Besides, the law gives the guardianship to such persons as are presumed to have the most affection for the infant; and therefore will not intrust executors with it who may happen to be strangers.

Plow. 293 b; 2 Inst. 260; Co. Lit. 89, S. P.

If a feme infant, who is in ward, marries, at common law the guardianship is determined, because the husband is, immediately on the marriage,

## (F) Guardian's Interest in the Body, &amp;c. of the Ward.

become her guardian; and it would be inconsistent that she should at the same time be under the power of another guardian.

2 Inst. 260. [1 Ves. 91; *β* *Kettletas v. Gardner*, 1 Paige, 488.*g* Though the Court of Chancery cannot appoint a guardian after marriage, yet it will not determine a guardianship, or discharge any order made for a guardian because of marriage. *Roach v. Garvan*, 1 Ves. 159. *β* *Matter of Whitaker*, 4 Johns. 378.*g*

If a feme guardian in socage marries, the husband becomes guardian in right of his wife; but, if she dies, the guardianship ceases as to him, and shall go to the next of kin to the infant.

Plow. 294 a; Co. Lit. 89 a, S. P.

A guardian in socage shall not forfeit his interest by outlawry, or attainder of felony, or treason; because he hath nothing to his own use, but to the use of the heir.

Co. Lit. 88 b; Godb. 316.

*β* If two persons are appointed by the court guardians of an infant, during his minority or until further order, the guardianship is at an end on the death of one of them, and there must be a new appointment.

*Bradshaw v. Bradshaw*, 1 Russ. 528.

When a guardian, after his ward attains full age, continues to manage the property at the request of the ward, and before the accounts of his administration during the minority are settled, it is in effect, a continuation of the guardianship as to the property, and he must account on the same principle as if they were transactions during the minority.

*Mellish v. Mellish*, 1 Sim. & Stu. 138.*g*

## (F) Of the Guardian's Interest in the Body and Lands of the Ward, and his Remedy for the same.

As the law hath invested guardians not with a bare authority only, but also with an interest till the guardianship ceases, so it hath provided several remedies for guardians against those who violate that interest; and therefore, at common law, there were remedies, both droitual and possessory, to recover the guardianship.

2 Inst. 90; 9 Co. 72.

As, at common law there was the writ *de custodiâ terræ et hæredis*, called the writ of right of ward, wherein the guardian recovered the custody of body and lands; but, if the ward were married, then the guardian was driven to this action of trespass, *Quare se intrusit maritagio non satisfact*. But this was remedied by the statute of Merton, c. 6, which provides, that, in the writ of right of ward, the plaintiff shall recover the value of the marriage.

2 Inst. 90.

Also, at common law, an action of trespass lay for the guardian, which was a possessory action; and in this, at common law, he could only recover damages for his ward, and not the ward itself; but the statute of (a) Westm. 2, c. 35, gives a writ of ravishment of ward, in which the plaintiff recovered the body of the heir, and not damages only.

2 Inst. 90, 438; 9 Co. 72; *Hussey's case*, Hob. 94. (a) And by the equity of this statute, a writ of ravishment lay for the guardian in socage, as a writ *in consimilicasu*. Co. Lit. 89 b; F. N. B. 139 I.—And it seems that a testamentary guardian may, by 12 Car. 2, c. 24, which gives such guardian the same remedies that a guardian in socage had, have a writ of ravishment of ward. 3 Keb. 528. *β* Guardians in socage and testamentary guardians, although they have no beneficial interest, yet have a legal

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interest accompanied with the possession of the ward's lands during the guardianship, and may maintain trespass for an injury to the ward's estate. *Truss v. Old*, 6 Rand. 556.*g*

If upon a *habeas corpus* an infant be brought into court, and it appear that the question is touching the right of guardianship, the court cannot deliver the infant to the guardian; for he may have a writ of ravishment of ward. 3 Keb. 528.

(B) A guardian who has stock standing in his name as guardian may sell and transfer it, and the officers of the bank have no right to control or prevent him from transferring it on their transfer book.

*Bank of Virginia v. Craig*, 6 Leigh, 399.

A guardian has no power to change the personal property of an infant into realty; and when it is done, and the infant dies under the age of twenty-one years, a court of equity considers it as personal property, and will divest the legal title out of the heirs at law, and vest it in the distributees.

*Roberts v. Jackson*, 3 Yerg. 77.

A guardian stands to his ward in *loco parentis*, and may maintain an action on the case, and recover damages for her seduction.

*Fernsler v. Moyer*, 3 Watts & S. 416.

In an action brought by a guardian on a mortgage taken in his own name for the use of three infants, his wards, it was held that the defendant could not set off a claim for clothes and other necessities furnished to each of the minors.

*Watson v. Hansell*, 7 Watts, 344.*g*

(G) What Things a Guardian may lawfully do, and will bind the Infants.

FROM the authority and interest which the policy of the law has invested guardians with, it appears that a guardian may do several acts which will bind the infant; such as making leases for years, which he may do in his own (a) name, and such lessee may maintain ejectment thereupon.

Co. Lit. 88, 89; Lit. § 123, 124. (a) May avow in his own name. Vaagh. 18.

Therefore, if a guardian in socage makes leases for years, to continue beyond the time of his guardianship, such leases seem not to be absolutely void by the infant's coming of age, but only voidable by him, if he thinks fit; for they were not derived barely out of the interest of the guardian, or are to be measured thereby, but take effect also by virtue of his authority, which, for the time, was general and absolute: and therefore all lawful acts done during the continuance of that authority are good, and may subsist after the authority itself by which they were done is determined; and, consequently, the infant, when he comes of age, may, by acceptance of rent, or other act, if he thinks fit, make such leases good and unavoidable. But a guardian *pur nurture* cannot make any leases for years, either in his own name, or in the name of the infant; for he hath only the care of the person and education of the infant, and hath nothing to do with his lands.

Bro. tit. *Gard*, 70; tit. *Gard*, 19; 2 Roll. Abr. 41, *Brisden and Hussey*; Cro. Ja. 55, 98, *Shopland and Ridler*.

A lets lands to B for four years, and dies, and the lands being holden in socage, and the heir under fourteen, the guardian in socage, by indenture, before the first lease is expired, lets the same lands in his own name to B for eight years. And if by this acceptance of a new lease from the guardian in socage the first lease was surrendered, was the question. And it is said

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to be holden by the court that it was surrendered; or, if it could not be properly called a surrender, for want of a reversion in the guardian in socage, yet they held, that at least the first lease was thereby (a) determined by admittance of the lessor's power to make such present lease, which, if the first should stand in the way, he could not do.

Leon. 158, 322; 4 Leon. 7; Owen, 45, 46, Willis and Whitewood. (a) In Hutton, 105, this case is cited, and there said, that, in strictness, it could not amount to a surrender properly so called, but that, however, it amounted to a determination.

In ejectment the case was, that one A devised lands to B his son in tail, with divers remainders over, and made one C overseer of his will, and willed that he should have the education of his son till he came to twenty-one, and to receive, set, and let for the said B the said lands so given him, and thereof to account to the said B, being allowed his charges, &c. C made a lease for seven years in his own name, with reservation of rent to himself, and this lease by computation, was to continue half a year after B's attaining his full age; and if this lease was good for any part of the term was the question, C being dead, and B not of age? And it was argu'd to be good for the whole term, or at least during the minority of the son, and only void for so much as exceeded the full age of the son; and that C had an interest in the land, and not a bare authority only; for then all leases must have been made in the name of the infant, and so he might avoid them whenever he thought fit, which the testator never intended to empower him to do. But Popham, Clench, and Fenner held, that as this devise is, C was but a guardian for nurture, and could not make leases at his own will and pleasure, for then he might make them for an hundred years; but here he can only make leases at will; for there is no other time certain appointed, and he is but in the nature of a bailiff, and accountable; and therefore it was adjudged that the lease was void. From which case it appears, that if the authority had been sufficient to enable him to make leases for years, such leases made by him, during the continuance of that authority, would not have determined therewith, but should have subsisted during the whole term for which they were made: and the infant in such case could not when he came of age have avoided them, as he may leases made by his guardian in socage, if he thinks fit; because the lessee would have been in by the will and devise, not by the guardian *pur nurture*.

Cro. Eliz. 678, 734, Pigot v. Garnish.

If a woman who is guardian in socage to her son marries again, and her husband and she join in a lease of the infant's lands, this lease upon the death of the husband becomes void; for the interest she had in the lands was in the right of the infant, and therefore shall not bind her, as those acts shall in which she joins with her husband in parting with her own possessions.

Plow. 293, Osborne's case.

A guardian in socage may grant copyhold estates in his own name, and such grant shall bind the heir, for he is *dominus pro tempore*, and shall take the profits to his own use, though he shall account for them; and he shall keep courts in his own name.

Cro. Ja. 55, 99; Poph. 127; Owen, 115; Godb. 145; Roll. Abr. 499; 2 Roll. Abr. 42.

Also it hath been resolved, that a guardian in socage may grant copyholds in reversion, according to the custom of the manor, and that such



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grants shall be good, though they come into possession during the nonage of the infant.

Mich. 8 W. 3, in C. B., Lade and Barker.

A guardian or *prochien ami* may make partition in behalf of an infant, and it will bind the infant, if equal; for the guardian is appointed by the law to take care of the inheritance of the infant; and this separation and division of his part from what belongs to another is so far from being a prejudice to the infant, that it is really for his benefit and advantage.

2 Roll. Abr. 236.

|| A guardian in socage is entitled to the possession of the ward's property, and is incapable of being removed from it. He has not a mere office or authority, but an interest in the ward's estate. He may maintain trespass and ejectment, avow for damage feasant, make admittance to copyhold, and lease in his own name. He cannot indeed convey the property absolutely as an executor or administrator, because the nature of the trust does not require it in the one case as it does in the other; but he may dispose of it during his guardianship, though accountable afterwards to the heir. Residing therefore on the ward's estate for forty days, he gains a settlement in the parish, and cannot be removed from the possession of it at any time.

10 East, 494; Wade v. Baker, 1 Ld. Raym. 131; R. v. Oakley, 10 East, 491.||

As the authority and interest of a guardian extend only to such things as may be for the benefit and advantage of the infant, and whereof he may give an account; on this foundation it is holden, that a guardian cannot present to any benefice in the right of the heir, because he can make no advantage thereof (for that would be simony); and, consequently, has nothing therein whereof he can give an account, and therefore the (a) infant himself shall present thereto.

Co. Lit. 17 b, 89 a; 29 E. 3, 5. β A guardian by his consent cannot bind the infant, unless his acts are for the infant's benefit. Rogers v. Crugar, 7 Johns. 557. See Roberts v. Wilson, 2 Bibb, 597. g (a) But in Cro. Ja. 99, it is said, that if the heir be within the age of discretion, the guardian may present in his name.—But Parson's Law, c. 10, f. 76, makes a *quare* hereof, and supposeth that it must be intended of a guardian by knight-service, and not a guardian in socage.—And in 3 Inst. 156, it is said by my Lord Coke, that the heir shall present of what age soever he be, and not the guardian. [See *acc.* Arthington v. Coverley, 2 Eq. Ca. Abr. 518. Mr. Hargrave observes in his edition of Co. Lit. note 1, 89 a, that though this last case "may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen whether the want of discretion would induce a court of equity to control the exercise, where a presentation is obtained from the infant without the concurrence of the guardian."]

But yet a presentment made by the guardian in the name of the heir, is a good title to the heir in *quare impedit*.

42 E. 3, 130.

Also a guardian in socage of a manor to which an advowson is appendant, if he be disturbed, shall have a *quare impedit* in his own name, although he can make no advantage thereof.

Hob. 132.

If a guardian puts in an answer to a bill in Chancery for an infant, on oath, such answer shall not conclude the infant, nor be (b) read in evidence against him; for the effect of an infant's answer to a bill in Chancery is to no other purpose than to make proper parties, so as to have an opportunity to take depositions, and to examine witnesses to prove the matter in question.

Carth. 79; 3 Mod. 259; 1 Show. 89; Eccleston v. Petty, 2 Vent. 72; Prec. Ch.

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229; Gilb. Eq. Rep. 4; 1 P. Wms. 504; 2 P. Wms. 387, 401; 3 P. Wms. 237. [Ex-ceptions cannot be taken to an infant's answer. *Stradwick v. Pargiter*, Bunb. 338. Nor will an infant's not replying to an answer, be an admission of the facts in the answer, as in the case of an adult, for an infant can admit nothing. *Legard v. Sheffield*, 2 Atk. 377.] (b) If an infant put in an answer by guardian, and there be a decree against him, without any day given him to show cause, such answer shall not be read or admitted as evidence against him when he comes of age; but, if a superannuated defendant put in an answer by his guardian, it shall be read against him at any time after, for he is supposed to grow worse, and is not to have a day to show cause. *Abr. Eq.* 281, *Leving and Caverley*.

An estate having descended to an infant, subject to incumbrances; and the question being, whether a guardian might, without the direction of a court of equity, apply the profits to discharge the incumbrances, or the interest of them, or whether they should not be accounted personal estate, and so the administrator of the infant be entitled to them, if the infant died in his minority; it was holden by the court, that a guardian, without any direction, may pay the interest of any (a) real encumbrance, and the principal of a mortgage; because that is a direct and immediate charge on the land; but not any other real encumbrance.

*Abr. Eq.* 261, *Palmer v. Danby*. (a) That a guardian should pay off a judgment with the profits of the infant's estate. *Bressenden v. Decrees*, 2 Ch. Ca. 197, and vide Ch. Ca. 156.

And therefore where a widow, who was guardian to her son, received the rents and profits of his estate, and paid off debts by specialty, but took assignments of the bonds, the son dying in his minority, she brought her bill against the defendant the heir, for a discovery of assets by descent to satisfy the money due by bond, she claiming the profits as administratrix to her son; it was holden by the court, that the guardian was not compellable to apply the profits of the estate of the infant heir to pay off the bond debts. (b)

2 Vern. 606, *Waters v. Ebral*. (b) *Semb. contra*, *Chaplin v. Chaplin*, 3 P. Wms. 366.

If a guardian borrows money of A to pay off an encumbrance on the infant's estate, and promises to give A security for his money, but dies before it is done; though A's money is applied to pay off the encumbrance, yet the court will not decree him satisfaction out of the infant's estate; but, if the sum disbursed exceeds the profits of the estate, for so much A shall have an account as for money due to the guardian, and it shall be raised out of the infant's estate.

2 Vern. 480, *Hooper v. Eyles*.

A guardian to an infant, having a considerable sum of money in his hands that was raised out of the infant's estate, lays out, with the consent of his grandmother, 3000*l.* in a purchase of lands which lay contiguous to the infant's estate, and takes the purchase in the name of J S for his benefit, if, when he came of age, he should agree thereto, and allow that money on account; the infant dying in his minority, it was holden by my Lord Chancellor, C. B. Atkins, and J. Lutwyche, against the opinion of the Master of the Rolls, that though neither the heir nor administrator of the infant were entitled to the lands, yet the guardian must account for this 3000*l.* to the administrator of the infant; and that it was not in the (c) power of the guardian, without the direction of this court, to turn the personal into real estate, by which it would descend to the heir; and that the objection, that an infant may make a will at seventeen of his personal estate, but not of his real, was not answered.

Vern. 403, 435, *Earl of Winchelsea v. Norcliff*. [(c) Where the committee of a

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lunatic invested part of the lunatic's personal estate in a purchase of lands made in the lunatic's name; it was holden, that he had exceeded his power, by changing the personal estate into real, and thereby defeating the next of kin in favour of the heirs at law; and therefore the court decreed, that the purchased lands should be sold, and the money divided amongst the next of kin, according to the statute of distributions, 2 Vern. 192, *Awdley v. Awdley*. A guardian cannot change the nature of the ward's estate, unless by some act manifestly for the ward's advantage. || *Rook v. Worth*, 1 Ves. 451; *Tullitt v. Tullitt*, Ambl. 370; *Inwood v. Twyne*, Id. 417; 2 Eden, 148, S. C.; *Ex parte Bromfield*, 1 Ves. jun. 453; 3 Br. Ch. Rep. 510, S. C.; *Vernon v. Vernon*, cited *Ibid.*; *Terry v. Terry*, Pr. Ch. 273; *Gilb. Eq. Rep.* 10, S. C. || [Therefore, where an estate in mortgage descends to an infant, the guardian must not let the interest run in arrear to increase the personal estate, but should regularly apply the profits of the estate to keep it down. *Jennings v. Looks*, 2 P. Wms. 278.]

A mother, as guardian to her infant son, had, out of his personal estate, paid off a mortgage; the infant afterwards died, and the estate descended to a remote heir, and then the mother would have had back the money, but the court denied her any relief.

2 Vern. 193, *Zouch v. Lloyd*, cited.

|| A woman, having a bishop's lease to her and her heirs for three lives, devised it to her daughter, an infant, and directed the guardian and trustees to make purchases for the infant's benefit. The guardian, upon the dropping of one of the lives, took a new lease for three new lives; and the infant afterwards dying, the question was, whether the new lease should go to the old uses? Lord Hardwicke held that it should not, but that it should go the heirs *ex parte paternâ*; that it is to be considered as a new acquisition, and to vest, consequently, in the infant as a purchaser; that the mother had directed the guardian to make purchases for the infant's benefit, and that the surrendering of the old, and taking of the new lease, was the most beneficial purchase for the infant that could be, and therefore ought to have, as the act of the guardian will have, when it is just and reasonable, the same consequence as if done by the infant herself, which, in this case, was to change the course of descent to the paternal line.

*Pierson v. Shore*, 1 Atk. 480; Ambl. 719, S. C. cited by the name of *Mason v. Shore*; *Mason v. Day*, Pr. Ch. 319; *Gilb. Eq. Rep.* 77, S. C. ||

|| If the guardian expends more in the maintenance of the infant than the sum allowed, the court will not make any reference as to such extra expenditure, unless a special case is made for that purpose.

*Rainsford v. Freeman*, 1 Cox, 417.

The court never makes an order for taking an infant out of its jurisdiction.

*Mount Stuart v. Mount Stuart*, 6 Ves. 363.

The acts of a guardian without authority, if beneficial to the infant, will be protected; and where a guardian renews an infant's leases during minority, the trust must follow the actual interest of the infant, which cannot be affected by any act done by the infant during minority.

*Milnes v. Ld. Harewood*, 18 Ves. 273; and see 6 Ves. 419. ||

## (II) Of the Infant's Remedy against his Guardian for Abuses by him.

At common law, both a prohibition of waste and an action of waste lay against a guardian in chivalry and a guardian in socage, for a voluntary, but not for permissive waste, or waste done by a (a) stranger.

2 Inst. 305. (a) But, if there be two jointenants of a ward, and the one do waste, this is the waste of both, for he is no stranger. 3 E. 3, 18.

## (II) The Infant's Remedy against the Guardian.

If a guardian suffereth a stranger to cut down timber trees, or to prostrate any of the houses, and doth not, according to his duty and office as guardian, endeavour to keep and preserve the inheritance of the ward in his custody and keeping, and doth not prohibit and withstand the wrong-doer; this shall be taken in law for his consent, according to the rule, *qui non prohibet quod prohibere potest, assentire videtur*; and if such waste and destruction be done without the knowledge of the guardian, or with such force as he could not withstand, then ought the guardian to cause an assize to be brought against such wrong-doers by the heir, wherein he shall recover the freehold, and damages for such wrong and disherison.

2 Inst. 305.

And if the heir brings his action of waste within age, the judgment, according to the statute of Gloucester, 6 Edw. 1, c. 5, shall not only be to recover *locum vastatum*, but the guardian shall lose the whole wardship, and yield to the heir single damages, if the wardship be not sufficient to satisfy the damages.

2 Inst. 305.

If the guardian doth waste, and after assigneth over his interest, an action of waste lieth against the grantor in the *tenet*.

2 Inst. 305.

Also, if the waste be committed so near the time of the infant's coming of age, that he could not conveniently bring his action of waste during his minority; yet, after the determination of the guardian's interest, he may bring his action of waste, and, in such case, as he cannot recover the wardship which is ended, he shall, by the statute of Gloucester, recover treble damages.

2 Inst. 306.

By Westm. 2, c. 5, if lessee for years, or guardian alien in fee, the remedy for recovering the freehold shall be by an assize of *novel disseisin*, and both the feoffor and feoffee shall be esteemed disseisors, and the survivor of them shall be liable to this remedy. So, if either happen to die, he that survives may be construed a disseisor, and, as such, liable to this action.

2 Inst. 413.

Not only guardians in chivalry, but in socage, and by nature, come within this law of Westm. 2. So also their alienations, not only in fee, but in tail, or for life, are within the act.

If a guardian accepts of a feoffment from his ward, the ward may bring an assize against him as a disseisor; for the guardian acts contrary to his duty, when he consents to any alienation made by his infant; for it is his duty to protect the inheritance of his ward, and to deliver it up to him at full age, and not to bring it into his own family.

Bro. *Disseisin*, 95. || In *Oldin v. Sāmborne*, 2 Atk. 15, Lord Hardwicke said, that it was improper for a guardian to purchase his ward's estate immediately on his coming of age; but, though it had a suspicious look, yet, if he paid the full consideration, it was not voluntary, and could not be set aside. But it seems clear, that such a purchase would now be set aside on general principles, without reference to the adequacy of the consideration. Sugd. L. V. 488. See also tit. *Fraud*, *supra*, vol. iii. 780.||

If a guardian, after the full age of his heir, continues in possession, he is an abater, and an assize of mortdancestor lies against him by the heir; but he cannot be deemed a disseisor, because he does not actually oust the heir of his freehold, which is required in a disseisin, but holds him out by an

## (I) Of obliging a Guardian to account.

intermediate entry between him and his ancestor, which makes the distinction between an abatement and a disseisin.

Co. Lit. 57 b; 271 a; 2 Inst. 134. [P. 9 Car. C. B. on the argument of the case of *Blundell v. Baugh*, commonly called the Earl of Nottingham's case, Justice Barclay said, that he whom Lord Coke in this case calls an abator, must be taken for a disseisor, as he had actual possession by the possession of the guardian. Lord Nott. MSS.—See Cro. Car. 302; Lit. Rep. 372; 1 Vent. 35, 80; Co. Lit. 271 a, n. 213th edit.]

If an infant appears by guardian and suffers a recovery, this shall bind him. And one of the reasons hereof is, that if the recovery be to the prejudice of the infant, he has his (a) remedy for it against his guardian, and may reimburse himself out of his pocket, to whom the law had committed the care of him.

Roll. Abr. 731. But for this vide tit. *Fines and Recoveries*. (a) If a guardian faint pleads or mispleads, the infant hath an action against him. Dyer, 104 b; Mod. 48, 49. A guardian suffered a dowress to recover at law, by not setting up a term which was created for protecting a purchase, and the infant was relieved in equity. Pr. Ch. 151; 2 Vern. 378, S. C.; 1 P. Wms. 137, S. C.; 1 Br. P. C. 137.

β When by the acts of one trustee or guardian money gets into the hands of his co-trustee or co-guardian, both are answerable for it.

*Graham v. Davidson*, 2 Dev. & Bat. Eq. 156; *Pim v. Downing*, 16 S. & R. 66.

An infant has the right to investigate his guardian's accounts for one year after coming of age, and till then the guardian is not entitled to have his bond cancelled.

In the matter of *Van Horn*, 7 Paige, 46.g

## (I) Of obliging a Guardian to account, and what Allowance he shall have.

By the (b) common law, guardians in socage are accountable to the infant, either when he comes to the age of (c) fourteen years, or at any time after, as he thinks fit.

Co. Lit. 87. (b) At common law, executors could not have an action of account, nor could any but the king have such an action against them; for matters of account lie so much in privity between the parties, that those who are strangers thereto can neither tell what allowances ought to be made by the one party, or what might be alleged in discharge of the other; but by Westm. 2, c. 23, if the heir make his will, (which it seems to be agreed he may now do at the age of fourteen,) his executors shall have an action of account against guardian in socage; and by 25 E. 3, c. 5, executors of executors may have such an action; and by 31 E. 3, c. 11, administrators; and by 4 & 5 Ann. c. 16, an action of account lies against the executors of a guardian, bailiff, or receiver. Co. Lit. 87. (c) That an infant may by his *prochein amy* call his guardian to an account even during his minority. 2 Vern. 342; 1 P. Wms. 119. [The Court of Chancery will permit a stranger to come in and complain of the guardian and abuse of the infant's estate. *Earl of Pomfret v. Lord Windsor*, 2 Ves. 484.]

But the guardian, on his account, shall have allowance of all reasonable expenses; and if he is (d) robbed of the rents and profits of the land without his default or negligence, he shall be discharged thereof upon his account; for he is in the nature of a bailiff or servant to the infant, and undertakes no otherwise than for his diligence and fidelity.

Co. Lit. 89 a. (d) So, if the infant's estate suffers by thunder, lightning, and tempest, or other inevitable accidents. 8 Co. 84. β The court will use vigilance in protecting the interests of infants. *Jenkins v. Walter*, 8 Gill & Johns. 218; *Elliott v. Elliott*, 5 Binn. 8; *Say's Executors v. Barnes*, 4 S. & R. 114.g

If a man enters as guardian into the lands of an infant, who has no title to the guardian, it is at the (e) election of the infant to make him a disseisor

## (I) Of obliging a Guardian to account.

on account of his wrongful entry upon, and actual ouster of, such infant, or else dissemble the wrong, and call him to an account as guardian.

Roll. Abr. 661; Cro. Car. 221. (e) If guardian in socage occupy after the heir attain to the age of fourteen years, he may be charged as bailiff. 2 Inst. 380.

If a man during a person's infancy receives the profits of an infant's estate, and continues to do so for several years after the infant comes of age, before any entry is made on him; yet he shall (a) account for the profits throughout, and not during the infancy only.

Abr. Eq. 280, Yallop and Holworthy. (a) If a man intrude upon an infant he shall receive the profits but as a guardian, and the infant shall have an account against him in Chancery. Vern. 295.

A receiver to the guardian of an infant, who has had his account allowed him by the guardian, shall not be obliged to account over again to the infant when he comes of age.

Pr. Ch. 535.

If a guardian takes a bond for the arrears of rent, he thereby makes it his own debt, and shall be charged with it.

2 Ch. Rep. 97, Wale and Buckley.

If a guardian to an infant, whose lands are encumbered to the value of 600*l.*, buys it off with 100*l.* of the infant's money, he shall not charge the infant with the 600*l.*

2 Ch. Ca. 245.

β When the same person is both executor of an estate, and guardian of the legatees, it is proper in his accounts of executor and guardian to credit him in the first and charge him in the second with a legacy given to his ward.

Graham v. Davidson, 2 Dev. & Bat. Eq. 174.

One indebted to himself as guardian, shall be presumed to have paid the debt, and he will be answerable in his character of guardian, and his sureties will also be liable for it.

O'Neill v. Herbert, C. W. Dud. Eq. 30; Adm'rs of Johnson v. Ex'rs of Johnson, 2 Hill's Ch. 285.

One irregularly appointed guardian will be treated as an ordinary trustee or legal guardian, when he has been guilty of fraud. He will be held to account for all moneys received and simple interest thereon, from the time he should as a faithful trustee have made it productive.

Crooks v. Turpen, 1 B. Monroe, 185.

A guardian violates his duty by permitting his ward to live in idleness, and supporting him out of his estate; and if he do so, he will not be allowed such expenses in his accounts.

Clark v. Clark, 8 Paige, 152.

It is the duty of a guardian to employ able counsel for the estate, and, on the settlement of his accounts he will be allowed any amount he may have paid not exceeding the usual charges for such services.

Chapline v. Moore, 7 Monroe, 150. See M'Dowell v. Caldwell, 2 M'Cord, Ch. 56.

Where there are several children, it is the duty of the guardian to keep separate accounts with each.

Baker v. Richards, 8 S. & R. 12. See Hampton's case, 17 S. & R. 144.*g*

||Guardians and receivers are obliged to account, on application by petition or motion, being bound by their recognisances to do so when called upon,

(A) Of the Nature of Writs of *Habeas Corpus*.

and they are considered as officers of the court; but it is otherwise with executors, for there is no regular way of calling them to account but by bill; and, therefore, the court will not on motion allow them to account before the master for the property which their testator had bequeathed to minors, as an account so taken would not be binding on the minors, there being no suit in court to which they were parties.

*In re Burke*, 1 Ball & B. 74; and see *Ibid.* 219, 405; 4 Ves. 362; 6 Ves. 473.

Where a transaction appears to have originated in the influence arising from the relation of guardian and ward, the court will set it aside, though all the accounts have been settled, and such relation is at an end.

*Wright v. Proud*, 13 Ves. 138.||

## HABEAS CORPUS.

(A) Of the Nature and several Kinds of Writs of *Habeas Corpus*.(B) Of the *Habeas Corpus ad Subjiciendum*: And herein,

1. *What Courts have a Jurisdiction of granting it.*
2. *To what Place it may be granted.*
3. *In what cases it is to be granted, and where it is the proper Remedy.*
4. *How far the Courts have a discretionary Power in granting or denying it: And therein, of the Habeas Corpus Act.*
5. *Of the Manner of suing it out, and the Form of the Writ.*
6. *To whom it is to be directed.*
7. *By whom to be returned.*
8. *Of the Manner of compelling a Return, and the offence of a false Return.*
9. *What Matters must be returned together with the body of the Party.*
10. *Where the Return shall be said to be sufficient, and to Warrant the Commitment.*
11. *Whether the Party can suggest any Thing contrary to the Return.*
12. *Whether any defect in the Return may be amended.*
13. *What is to be done with the Prisoner at the Return: And therein, of bailing, discharging, or remanding him.*

(C) Of the *Habeas Corpus ad faciendum et recipiendum*.(A) Of the Nature and several Kinds of Writs of *Habeas Corpus*.

WHEREVER a person is restrained of his liberty by being confined in a common jail, or by a private person, whether it be for a criminal or civil cause, he may regularly by *habeas corpus* have his body and cause removed to some superior jurisdiction, which hath authority to examine the legality of such commitment, and on the return thereof, either bail, discharge, or remand the prisoner.

Vaugh. 136, *Bushell's case*. And that it is at this day the most usual remedy to be relieved against a wrongful imprisonment. β The interdiction *De homine libero exhibendo* of the Roman law was a remedy very similar to the writ of *habeas corpus*. When a free-man was restrained by another contrary to good faith the prætor ordered his interdiction that such person should be brought before him that he might be liberated. Dig. 43, 29, 1.g

(A) Of the Nature of Writs of *Habeas Corpus*.

The *habeas corpus ad subjiciendum* is that which issues in criminal cases, and is deemed (a) a prerogative writ, which the king may issue to any place, as he has a right to be informed of the state and condition of the prisoner, and for what reasons he is confined. It is also in regard to the subject deemed his writ of (b) right, that is, such an one as he is entitled to (c) *ex debito justitiæ*, and is in nature of a writ of error to examine the legality of the commitment; and therefore commands the day, the caption, and cause of detention to be returned.

2 Inst. 55; 4 Inst. 182. (a) Cro. Ja. 543; 2 Roll. Abr. 69. (b) That it is an ancient and legal writ. Cro. Car. 466. But it is no original writ. Carter, 221, per Vaughan. (c) 4 Inst. 290.

The *habeas corpus ad faciendum et recipiendum* issues (b) only in civil cases, and lies where a person is sued and in jail, in some inferior jurisdiction, and is willing to have the cause determined in some superior court, which hath jurisdiction over the matter; in this case the body is to be removed by *habeas corpus*, but the proceedings must be removed by *certiorari*.

For this vide *infra*. (d) If upon this writ a civil action, and also a matter of crime be returned; as, if a person be arrested for debt, and also charged with a warrant of a justice of peace for felony; in such case, 1. If it appear to the judge or court, that the arrest for debt, or other civil action, is fraudulent; they may remand him. Harrison's Case, Dy. 249 b. 2. If it be found real, they may commit him to the King's Bench with his causes, though they are matters of crime, for that court hath consuance as well of the crime as of the civil action; but then in the term the court may take his appearance or bail to the civil action, and remand him, if they see cause, as to the crime to be proceeded on below. But upon the writ *ad faciendum et recipiendum*, there ought not singly a matter of crime to be returned, for that belongs to the *habeas corpus ad subjiciendum*. 2 Hal. Hist. P. C. 145; and vide 6 Mod. 133.

There is likewise a writ of *habeas corpus ad respondendum*, where a person is confined in a jail for a cause of action accruing within some inferior court; and a third person hath also a cause of action against him; in which case he may have this writ in order to charge him in some superior court; for inferior courts being tied down to causes arising within their own jurisdiction, the party would be without remedy, unless allowed to sue him in another court. But (e) it seems, that regularly a person confined in B. R., cannot be removed to the C. B. by this writ, nor *vice versâ*; for in these cases there can be no defect of justice, as these courts have (g) consuance as well of local as transitory actions.

Dyer, 197 a, 249, pl. 84, 296, 307; Mod. 235; Styl. P. Reg. 330; 2 Str. 936; 2 Burr. 1048. (e) If one in the Counter be removed into the King's Bench by *habeas corpus*, and intending to go over to the Fleet, procure some friend to bring a *habeas corpus* to remove him thither, he shall not be removed thither until he has answered to the cause in B. R., for he shall not compel the plaintiff to follow after a prolling defendant; and so *vice versâ* of the Common Pleas; each court shall retain the defendant where he is first attached, and after he has answered there, he may be carried anywhere. Salk. 350. [Where a defendant charged with process out of B. R. is removed before declaration to the Fleet prison, the plaintiff, in order to enable himself to declare against him in B. R. must remove him there by this writ; otherwise his proceeding must be in C. P. Maddock v. Fletcher, Barnes, 384; Beasley v. Smith, Ibid. 402; Sherson v. Hughes, 5 T. R. 36. If defendant be removed after declaration delivered, the plaintiff may proceed where he hath declared. Ash v. Day, Barnes, 384.] (g) And therefore this writ lies not to a county palatine, Salk. 354, pl. 17; nor to the cinque ports, unless the action be local, so that they cannot have consuance of it. Mod. 20; 8 Mod. 22; 12 Mod. 666. [This writ doth not lie for the plaintiff in an inferior court to remove the body of the defendant into B. R., to answer to a new action there for the same debt. Melsome v. Gardner, Cowp. 116.] || And a prisoner under criminal process in the house of correction cannot be brought up by this writ for the purpose of being charged with a declaration on a bailable writ, and recommitted to his former custody so charged. Bran-



(A) Of the Nature of Writs of *Habeas Corpus*.

don v. Davis, 9 East, 154; Walsh v. Davies, 2 N. R. 245. || [If a defendant in custody at the suit of the crown, he cannot be turned over on a *habeas corpus* to another prison at the instance of a private person for debt, on an allegation of a pardon by act of parliament, but it must be by suggestion on record, that the crown may traverse it. Rex v. Pawlett, Andr. 274. A prisoner in the Fleet for contempt in the Exchequer in not paying a debt to the crown, may be brought into B. R. by *habeas corpus*, and surrendered to the marshal, in discharge of bail in another case, and cannot be remanded to the Fleet on motion; but a *habeas corpus* must be brought from the Exchequer, which the marshal will return there, and they will remand to the Fleet. So in civil causes between subject and subject, and in criminal causes at the suit of the crown. Chitty's case, 1 Wils. 248. See to the case of the bail of Berce and Sellers, 1 Str. 641. A *habeas corpus* may be had to bring up an impressed man, or a soldier, in discharge of bail; but as soon as he is surrendered and committed, he will be discharged. Bond v. Isaac, 1 Burr. 339.] {The common pleas cannot issue this writ to remove a prisoner in custody for a crime, in order to have him charged with a declaration in a civil action. 5 Bos. & Pul. 245, Walsh v. Davies. And in the King's Bench, the proceedings in such a case are on the crown side of the court. 3 East, 232, The case of John Taylor.} || Coffin v. Gunner, 2 Str. 873; 2 Ld. Raym. 1572, S. C.; 1 Barnardist. 339, 341, 356, S. C. Case of the bail of Peter Vergen, 2 Str. 1217. See Fowler v. Dunn, 4 Burr. 2034. A lunatic has been brought up by *habeas corpus* from St. Luke's Hospital, to be surrendered in discharge of his bail. Pillon v. Sexton, 3 Bos. and Pull. 549. ||

There is also a *habeas corpus ad satisfaciendum*, which issues where a defendant is removed to another prison *after* declaration, and the plaintiff having obtained judgment against him, is desirous of bringing him back in order to charge him in execution. The number of the judgment-roll should be endorsed on the writ by the attorney who sues it out; and this writ, as well as the *habeas corpus ad respondendum*, should be directed to the keeper of the prison, returnable at a day certain in court.

1 Sid. 100; 2 Str. 1153; Barnes, 385; 2 Lit. Pr. R.; 2 C. Sty. Pr. Reg. 331; Tidd's Pr. 345, 346; Pr. Reg. Canc. 101.

There is also a *habeas corpus ad testificandum*, which lies to bring up a witness, who is detained in prison. For this writ an application is made to the court or a judge, upon an affidavit sworn to by the party applying, that the person is a material witness, and willing to attend, (a) and if he be at a distance, the court will expect that it be specially shown how he is material. (b) Upon this application the court in their (c) discretion will make a rule, or the judge, if he think proper, will grant his *fiat* for the writ, which is then sued out, signed, and sealed. And the Court of King's Bench, in one instance, (d) issued this writ to bring up a prisoner to give evidence before an election committee of the House of Commons, on affidavit of service of a rule to show cause on the different persons concerned, no cause being shown. But doubts having arisen, whether the justices of his majesty's courts of record at Westminster had power to award writs of *habeas corpus* for bringing persons detained in custody under civil or criminal process before courts martial, commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners acting under commission or warrant from his majesty, it is enacted by 43 G. 3, c. 140, "that it shall be lawful for any judge of his majesty's Court of King's Bench, or Common Pleas respectively, or for any baron of his majesty's Court of Exchequer, of the degree of the coif, at his discretion, (e) to award a writ or writs of *habeas corpus* for bringing any prisoner or prisoners detained in any jail or prison in that part of the United Kingdom of Great Britain and Ireland called England, before any court martial, or before any commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners, acting by virtue or under the authority of any commission or warrant from his

(A) Of the Nature of Writs of *Habeas Corpus*.

majesty, his heirs or successors, for trial, or to be examined, touching any matter depending before such courts martial or commissioners respectively; and the like proceedings shall be had upon such writ or writs of *habeas corpus* so to be awarded as aforesaid, as by law may now be had upon writs of *habeas corpus* for bringing persons detained in jail before magistrates or courts of record for such purposes as aforesaid."

Sty. 119, 126, 230; 3 Keb. 51; Comb. 17, 48; Tidd's Pr. 850. (a) *R. v. Roddam*, Cowp. 672. (b) — *v. Baker*, M. 26 G. 3, K. B. Tidd's Pr. 850. (c) *R. v. Burbage*, 3 Burr. 1440. The court have refused it to bring up a prisoner of war; the usual mode of obtaining his presence being by order of the Secretary of State. *Farley v. Newnham*, Dougl. 419. (d) In the matter of *Sir E. Price*, 4 East, 587. (e) It has been therefore holden, that the application for the writ under this statute should be made to a judge out of court. *Gordon's case*, M. & S. 582.

And by the 44 G. 3, c. 102, for the more effectual administration of justice in England and Ireland by the issuing of writs of *habeas corpus ad testificandum* in certain cases, "it shall be lawful for any judge of his majesty's Courts of King's Bench or Common Pleas of England or Ireland respectively, or any baron of his majesty's Court of Exchequer of the degree of the coif in England or any baron of his majesty's Court of Exchequer in Ireland, or any justice of oyer and terminer or jail-delivery, being such judge or baron as aforesaid, at his discretion to award a writ or writs of *habeas corpus* for bringing any prisoner or prisoners detained in any jail or prison, before any of the said courts, or any sitting of *Nisi Prius*, or before any other court of record in the said parts of the said United Kingdom, to be there examined as a witness or witnesses, and to testify the truth before such courts, or any grand, petit, or other jury, in any cause or causes, matter or matters, civil or criminal, depending or to be inquired into or determined in any of the said courts. And that every justice of great session in Wales, and in the county palatine of Chester, shall have the like authority within the limits of his jurisdiction."

|| In a late case, where there was a question as to the identity of the person of a defendant to an information, who was in prison, the Court of Exchequer granted a writ in the form of a *habeas corpus ad testificandum* to bring him up to be present at the trial, the costs of his being brought up and remanded to be paid by him.

Att.-Gen. v. Fadden, 1 Pr. 403.||

There is besides these a writ of *habeas corpus ad deliberandum et recipiendum*, which lies (a) to remove a person to the proper place or county, where he committed some criminal offence.

(a) A person committing a crime in Barbadoes, and apprehended here, may be sent thither by *habeas corpus* and tried. 3 Keb. 560, 566, 568, *Warner's case*.—Also, since the *habeas corpus* act, a person committing a criminal offence in Ireland, being here, may be sent to Ireland and tried there. *Colonel Lundy's case*, 2 Vent. 314; *R. v. Kimberley*, 2 Str. 848; 1 Barnard. K. B. 225, S. C.; *Fitzg.* 111, S. C.; 14 Vin. Abr. 569, pl. 7, S. C.—Also, justices of jail-delivery may send prisoners by *habeas corpus* to the sheriff of another county, and a precept to the sheriff of that other county to receive them, namely for a felony committed in that county, though that county be out of the circuit of the justice that sends them. 2 Hale's Hist. P. C. 37. If any *habeas corpus* come to receive a prisoner from another jail, the jailer is to take notice of the offence for which he stood committed at the other jail, and to inform the court, that if he shall happen to be acquitted or have his clergy, he may yet be remanded to the former jail, if there be cause. *Kelynge*, 4.—And if any *habeas corpus* come to the jailers to remove a prisoner, with the prisoner they are also to certify the cause for which he stood there committed. *Kelynge*, 4.

|| The Court of King's Bench will grant a *habeas corpus* to the Warden of

(B) Of the *Habeas Corpus ad subjiciendum*.

the Fleet to take the body of a debtor confined there before a magistrate, to be examined from time to time respecting a charge of felony or misdemeanor.

*Ex parte* Griffith, 5 Barn. & A. 730.

A cause cannot be removed from an inferior court by *habeas corpus* unless the defendant is actually or virtually in custody; a defendant for whom a common *appearance* is entered is neither.

Mitchell v. Mitcheson, 1 Barn. & C. 513; Palmer v. Forsyth, 4 Barn. & C. 401.

A *habeas corpus* will be granted to bring up a party in custody for felony, that he may surrender in discharge of his bail.

Sharp v. Sheriff, 7 Term R. 226.

But not in case of a party being in custody of a messenger to be taken out of the kingdom under the alien act, where his passage may probably be lost by the delay.

Folkein v. Critics, 13 East, R. 457.

Nor in case of a party in custody for a misdemeanor, in order that he may show cause in person against a criminal information.

Rex v. Parkyns, 3 Barn. & A. 679; and see 9 Price, 147.

Nor can a party confined for crime in a house of correction be brought up on *habeas corpus* to be charged with a declaration on a bailable writ and re-committed to his former custody charged therewith; for the court have no power to make a jailer (unless the sheriff or the jailer of the court) liable for the escape of a prisoner on mesne process.

Brandon v. Davies, 9 East, 154.||

(B) Of the *Habeas Corpus ad Subjiciendum*: And herein,1. *What Courts have Jurisdiction of granting it.*

It is clear, that both by the common law, as also by the statute,\* the Courts of Chancery and King's Bench have jurisdiction of awarding this writ of *habeas corpus*, and that without any privilege in the person for whom it is awarded. But it seems that, by the common law, the Court of King's Bench could have awarded it only in term-time, but that the Chancery might have done it as well out of as in term, because that court is always open.

2 Inst. 55; 4 Inst. 190; 1 And. 297; 2 Jon. 13, 14, 17. \*31 Car. 2, c. 2. β The Supreme Court of the United States, *Ex parte* Buford, 3 Cranch, 448; *Ex parte* Bollman, 4 Cranch, 75; the Supreme Court of New York, *United States v. Jenkins*, 18 Johns. 305; the Supreme Court of Pennsylvania, and the Supreme or Superior Courts of each of the states, may, in general, relieve from all illegal imprisonment, either in civil or criminal cases.*g*

If the *habeas corpus* issues out of Chancery, and on the return thereof the lord chancellor finds that the party was illegally restrained of his liberty, he may discharge him; or, if he finds it doubtful, he may bail him; but then it must be to appear in the Court of King's Bench, for the chancellor hath no power to proceed in criminal causes; or the chancellor may commit the party to the Fleet, and in term-time may *propriis manibus* deliver the record into the King's Bench together with the body; and thereupon the Court of King's Bench may proceed to bail, discharge, or commit the prisoner.

2 Hal. Hist. P. C. 147; 2 Hawk. P. C. c. 15, § 81.

If the *habeas corpus*, and also a *certiorari*, be granted returnable in Chancery, and the cause and body be returned there, they may be sent

(B) Of the *Habeas Corpus ad subjiciendum*.

into the King's Bench; if the body only be returned with the causes, by *habeas corpus* into the Chancery, and delivered over into the King's Bench, they may proceed to the determination of the return, and either by *procedendo* remand him, or grant a *certiorari* to certify the record also, and thereupon commit or bail the prisoner, as there shall be cause.

2 Hal. Hist. P. C. 147, 148.

But sending an *habeas corpus ad faciendum et recipiendum* by the chancellor for persons arrested in civil causes, especially being in execution, is neither warrantable by law nor ancient usage, and particularly forbidden by the statute 2 H. 5, stat. 1, c. 2, as to persons in execution.

2 Hal. Hist. P. C. 148.

There are several strong opinions, that no *habeas corpus ad subjiciendum* could, by the common law, issue out of the Courts of Exchequer or Common Pleas, unless it were in the case of privilege, because these courts are confined to civil causes merely; and therefore, unless the party were an attorney, or entitled to the privilege of the court as an officer, &c.; or unless there had been a suit commenced against him in those courts, they could not grant a *habeas corpus ad subjiciendum*, though they might any other writ of *habeas corpus*.

Dyer, 175 b, pl. 26; 2 Inst. 55; 3 Leon. 18; 4 Inst. 70, 182, 290; Mod. 235; 2 Mod. 198; Vaugh. 195; Carter, 221; 2 Vent. 22.

But notwithstanding these opinions, it was holden in Bushel's case, that the Court of Common Pleas may issue a *habeas corpus ad subjiciendum*; and that if it appeared, on the return thereof, that the party was imprisoned and detained against law, the court might, though there was no privilege in the case, discharge him; for that to remand him would be an act of injustice in the court, and contrary to *magna charta*.

Vaugh. 155, and several precedents of writs of *habeas corpus* of this kind out of the Court of C. B.; Wood's case, 2 Bl. Rep. 745; 3 Wils. 172, S. C. β The Court of Common Pleas have no power, under a writ of *habeas corpus*, to discharge a person who is in custody under a writ of *ne exeat* issued from a court of equity. Gilchrist, *ex parte*, 4 M'Cord, 233.g

|| Though the writ of *habeas corpus* at common law is a writ of right, it is not grantable of course, but only on a motion in term-time, stating a probable cause for the application, and verified by affidavit. *Quere*, Whether the writ is grantable of course under the 31 Car. 2, c. 2, which only applies where the application is made to a judge in time of vacation.

Hobhouse's case, 3 Barn. & A. 420.

The court on affidavit suggesting probable cause to believe that a helpless and ignorant female foreigner was exhibited for money against her consent, granted a rule on her keepers to show cause why a *habeas corpus* should not issue to bring her before the court, and directed an examination before the coroner and attorney of the court in presence of the parties applying and applied against.

*Ex parte Hottentot Venus*, 13 East, 195.

The court granted a rule *nisi* for a *habeas corpus* on behalf of an officer under military arrest for charges of misconduct, on an affidavit that he had not been brought to trial, pursuant to twenty-third article of war, as soon as a court martial could conveniently be assembled; but, it being sworn by the judge advocate general in answer, that proceedings were had as soon as they conveniently could be, and according to the course of office, and

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that the trial had been in part postponed on account of the absence of the prisoner's witnesses, the court discharged the rule.

Blake's case, 2 Maule & S. 428.

The court will grant a *habeas corpus* to bring up the body of a bastard child within the range of nurture, for the purpose of restoring it to the custody of the mother from whom it was taken by force and by fraud, without prejudice to the question of guardianship, which belongs to the chancellor.

Rex v. Hopkins, 7 East, 579.

So also to bring up an infant who has absconded from his father and is detained by a third person against his consent.

*In re Peason*, 4 Moo. 366.

Where the *habeas corpus* issues at common law, (as *e. g.* where the party is in custody on a charge of smuggling, this not being a criminal matter,) he may controvert the truth of the return by virtue of the 56 G. 3, c. 100, § 4.

*Ex parte Beeching*, 4 Barn. & C. 136.

Where a return to a *habeas corpus* stated, that the party on *due proof* was committed, this was held insufficient, and the proof must be stated that the court may judge if it be sufficient.

Nash's case, 4 Barn. & A. 295.

Where it appears on the facts of the return that the prisoners *might* be guilty of the offences imputed to them, the Court of King's Bench refused to discharge them, and committed them to the custody of the marshal to be taken before a magistrate to be examined as to the matters, and dealt with according to law.

*Ex parte Kraus*, 1 Barn. & C. 258. ||

Also, by the statute of 16 Car. 1, c. 10, they have an original jurisdiction to bail, discharge or commit, upon a *habeas corpus* for one committed by the council-table, as well as the King's Bench, and that although there be no privilege for the person committed.

2 Hal. Hist. P. C. 144.

Also, by the *habeas corpus* act, 31 Car. 2, c. 2, any of the said courts in term-time, and any judge of either bench, or baron of the exchequer, being of the degree of the coif, in the vacation, may award a *habeas corpus* for any prisoner whatsoever, (a) and on the return thereof, discharge him, if it shall clearly appear that the commitment was against law, as being made by one who had no jurisdiction of the cause, or for a matter for which no man ought by law to be punished; or bail him, if it shall be doubtful whether the commitment were legal or not; or remand him, according to the nature and circumstances of the case.

2 Jon. 14, 17. (a) This is too large; the act is confined to persons committed for criminal or supposed criminal matters. Vide *infra*.

β Upon a petition presented by the relator for a *habeas corpus* for the purpose of inquiring into the legality of his confinement in prison by virtue of a judgment of the Circuit Court of the United States for the District of Columbia, rendered upon a criminal prosecution instituted against him in that court, the petitioner alleged that the indictments for which he was convicted and sentenced to imprisonment, charge no offence for which

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he was punishable in that court, or of which the court could take cognisance, and, consequently, that the proceedings were *coram non judice*. The Supreme Court held it had no jurisdiction in criminal cases which could reverse or affirm a judgment rendered in the Circuit in such case, when the record is brought directly by writ of error.

*Ex parte* Tobias Watkins, 3 Pet. 201.

The relator has a right to proceed on a *habeas corpus ad subjiciendum*, notwithstanding the costs of a former writ of *habeas corpus* in the same matter remain unpaid.

The People *ex rel.* Barry v. Mercien, 3 Hill, 399.*g*

2. *β* By whom sued out, and to what Places it may be granted.

*β* 1st. By whom sued out.

A *habeas corpus* for the discharge of a soldier under age, may be sued out at the instance of the parent.

The United States v. Anderson, Cooke's R. 143.

A husband is entitled to a *habeas corpus* in favour of his wife; a guardian, in favour of his ward; and, of course, a father in favour of his son, while under age, particularly while he is under the age of fourteen years.

The United States v. Anderson, Cooke's R. 143.

2d. To what Places it may be granted.*g*

It had been already observed, that the writ of *habeas corpus* is a prerogative writ, and that therefore, by the common law, it lies to any part of the king's dominions; for the king ought to have an account why any of his subjects are imprisoned, and therefore no answer will satisfy the writ, but to return the cause with *paratum habeo corpus*, &c.

2 Roll. Abr. 69; Cro. Ja. 543. *β* A *habeas corpus* under the authority of the state of New York runs to West Point; to take away the jurisdiction of the state courts on a *habeas corpus*, within state territory ceded to the United States, such jurisdiction must be expressly surrendered by the state. In the matter of Carlton, 7 Cowen, 471.*g*

Hence it was holden, that this writ lay to (a) Calais at the time it was subject to the king of England.

Palm. 54. (a) Error of a judgment in the King's Bench in Ireland; it was suggested, that the plaintiff was in execution upon the judgment in Ireland; and the court seemed to be of opinion, that a *habeas corpus* might be sent thither to remove him, as writs mandatory had been awarded to Calais, and now to Jersey, Guernsey. Vent. 357.—See acc. 2 Burr. 856. A *habeas corpus* granted to Jersey. Sid. 386.

It hath been holden that this writ lies to the marches of Wales, as it does to all other courts which derive their authority from the king, as all the courts exercising jurisdiction within his dominions do; and that being a prerogative writ, it does not come within the rule *brevia domini regis non currunt*, &c., for that must be understood of writs between party and party.

2 Roll. Abr. 69, Wetherley v. Wetherley.

Also, it hath been adjudged, that (b) this writ lies to (c) the cinque ports, to Berwick, although objected to have been part of Scotland, and to the (d) county palatine.

(a) But a *habeas corpus ad faciendum et recipiendum* does not lie to the cinque ports. Sid. 431. (b) Palm. 54, 55, 96, Bourne's case; Cro. Ja. 543, S. C. adjudged. 2 Roll. Abr. 69. (c) Latch. 160, Jobson's case; 3 Keb. 279.

Also, by the *habeas corpus* act, 31 Car. 2, c. 2, § 11, it is declared and enacted, "That an *habeas corpus*, according to the true intent and true meaning of this act, may be directed and run into any county palatine, the

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cinque ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey, any law," &c.

|| And by 56 Geo. 3, c. 100, § 5, it is declared and enacted, "That a writ of *habeas corpus*, according to the true intent and meaning of this act, may be directed and run into any county palatine or cinque port, or any other privileged place within that part of Great Britain called England, dominion of Wales, and town of Berwick-upon-Tweed, and the isles of Jersey, Guernsey, and Man respectively; and also into any port, harbour, road, creek, or bay upon the coast of England or Wales, although the same should be out of the body of any county; and if such writ shall issue in Ireland, the same may be directed and run into any port, harbour, road, creek, or bay, although the same should not be in the body of any county; any law," &c. &c. ||

3. In what Cases it is to be granted, and where it is the proper Remedy.

A *habeas corpus* is a writ of right, which the subject may demand, and is the most usual remedy by which a man is restored to his liberty, if he hath been against the law deprived of it.

Vaugh. 136. β Whenever a person has been deprived of going when and where he pleased, and is restrained of his liberty, he has a right to inquire whether that restraint be legal or wrongful, and that whether it be exercised by a jailer, constable, or private individual. Commonwealth v. Ridgway, 2 Ashm. 247. In Vermont, the remedy by *habeas corpus* extends to persons imprisoned on final process. Kellog, *ex parte*, 6 Vern. 509.g

β It seems, that unless a party is actually confined or restrained of his liberty, the court cannot, under the laws of Pennsylvania, interfere.

Comm. v. Robinson, 1 S. & R. 356. But see *Ex parte* Ridgway, 2 Ashm. 247.

The writ of *habeas corpus* is an immediate remedy for every illegal imprisonment; but no imprisonment is unlawful when the process is a justification of the officer.

Commonwealth v. Lecky, 1 Watts, 67.

The writ of *habeas corpus* is not the proper remedy for relief from moral restraint, as for example, when a defendant in execution has given bonds not to leave the limits, a writ of *habeas corpus* is not the proper remedy to test the regularity of the proceedings on execution.

Dodge's case, 6 Mart. R. 570.

Where the defendant was imprisoned by virtue of a *ca. sa.* without first issuing a *fi. fa.*, and a writ of *habeas corpus* was granted, on the hearing the court held that the writ of *habeas corpus* was not the proper remedy, and accordingly refused to discharge him.

Bank of the U. S. v. Jenkins, 18 Johns. 305; Cabel v. Copper, 15 Johns. 152.g

By the 31 Car. 2, c. 2, § 9, it is enacted, "That if any person or persons, subjects of this realm, shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, (b) that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers, unless it be by *habeas corpus*, or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer, to carry such prisoner to some common jail; or where any person is sent by order of a judge of assize, or justice of the peace, to any common workhouse or house of correction; or where the prisoner is removed from one prison or place to

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another within the same county, in order to his or her trial or discharge by due course of law; or in case of sudden fire or infection, or other necessity; and if any person or persons shall, after such commitment aforesaid, make out and sign, or countersign, any warrant or warrants for such removal aforesaid, contrary to this act, as well he that makes, or signs, or countersigns such warrant or warrants, as the officer or officers that obey or execute the same, shall suffer and incur the pains and forfeitures in this act before mentioned, both for the first and second offence respectively, to be recovered in manner aforesaid by the party grieved."

(b) Vide 56 G. 3, c. 100, *infra*.

|| By 56 Geo. 3, c. 100, reciting, "That the writ of *habeas corpus* hath been found, by experience, to be an expeditious and effectual method of restoring any person to his liberty, who hath been unjustly deprived thereof; and that extending the remedy of such writ, and enforcing obedience thereunto, and preventing delays in the execution thereof, will be advantageous to the public; and that the provisions made by an act passed in England, in the thirty-first year of King Charles the second, intituled, *An Act, &c.*: and also by an act passed in Ireland, in the twenty-first and twenty-second years of his present majesty, intituled, *An Act for the better securing the liberty of the subject*, only extend to cases of commitment or detainer for criminal, or supposed criminal matter; it is enacted, That where any person shall be confined or restrained of his or her liberty, (otherwise than for some criminal, or supposed criminal matter, and except persons imprisoned for debt, or by process in any civil suit) within that part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, or the isles of Jersey, Guernsey, or Man, it shall and may be lawful for any one of the barons of the exchequer, of the degree of the coif, as well as for any one of the justices of one bench or the other; and where any person shall be so confined in Ireland, it shall and may be lawful for any one of the barons of the exchequer, or of the justices of one bench or the other in Ireland, and they are hereby required, upon complaint made to them by or on the behalf of the person so confined or restrained, if it shall appear by affidavit or affirmation (in cases where by law an affirmation is allowed) that there is a probable and reasonable ground for such complaint, to award, in vacation time, a writ of *habeas corpus ad subjiciendum*, under the seal of such court whereof he or they shall then be judges, or one of the judges, to be directed to the person or persons in whose custody or power the party so confined or restrained shall be, returnable immediately before the person so awarding the same, or before any other judge of the court under the seal of which the said writ issued."||

If a party be imprisoned against law, though he is entitled to a *habeas corpus*, yet may he have an action of false imprisonment, in which he shall recover damages in proportion to the injury done him.

Fitz. *corpus cum causa*, 2; 9 H. 6, 44 a; 2 Inst. 55; 10 H. 7, 17; 5 Co. 64; March, 117; 11 Co. 98, 99.

But it was holden in the case of Bushel, who, together with the other jurors appointed to try an indictment for a riot between the king and Pen and Mead, was fined at the Old Bailey, because they found a verdict *contra plenam evidentiâ et directionem curiæ in materiâ legis*; and, for non-payment of the fine, divers of them being committed to prison, brought their *habeas corpus* in C. B.; that though the imprisonment (a) was illegal, yet that no action lay against the commissioners, because they acted as judges; and commissioners of *oyer and terminer* can no more be punished for



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an erroneous commitment, than they can be for an erroneous judgment; and the highest remedy the party in this case can have is a writ of *habeas corpus*.

Mod. 119; 3 Keb. 322, 358. (a) Vaugh. 153; 2 John. 13; Sid. 273; 2 Bl. Rep. 1145.

If a husband confine his wife, she may have a *habeas corpus*; but the judges, on the return of it, cannot remove the wife from her husband.

2 Lev. 128. || But where the husband had confined the wife in a madhouse, and she had still reason to be apprehensive of danger from him, the court would not permit him to take her. R. v. Turlington, 2 Burr. 1115.||

A motion was made for a *habeas corpus* to the Lord Leigh, to have in court the body of his wife; and the case was, the parties were married in 1669, and because they were both within age, no settlement was made; in 1671, Lord Leigh persuades his wife to levy a fine of some lands of 900*l.* *per ann.* whereof she had the inheritance, to him and his heirs; and because she prayed to advise with her friends, he confined her until her mother had petitioned the king and council; and there the matter was referred to three lords of the council; and they made an award, which the Lady Leigh was ready to perform; but the Lord Leigh brought to her an instrument to be sealed, upon which she made the same request as before, that she might advise with her friends, but he refused to permit it, and presently compelled his wife to go with him to his house in the country, where he made her his prisoner; and though, by the barbarous usage of her husband, she fell sick, yet he would not let her have physicians or servants to attend her, or to be visited by her friends; *et per cur. a habeas corpus* was granted, for this is a writ of right, which the subject may demand, and the king ought to have an account of his subject; and though it was objected that there was no affidavit but of such complaint as the Lady Leigh had made in a letter to her mother, yet the *habeas corpus* shall go to put the lady in a condition to make oath of this matter herself, and to exhibit articles against her husband; for here is sufficient matter to compel him to find sureties of the peace, and of his good behaviour also; for this treatment the lady may sue out a divorce *propter sevitiam*: and in a like case between Sir Philip Howard and his wife a *habeas corpus* was granted; and in this case an attachment may be granted against my Lord Leigh, if he refuses obedience to the writ, for being a contempt, a peer has no privilege. (a)

Lady Leigh's case, Mitch. 26 Car. 2, in B. R.; 2 Lev. 128; 3 Keb. 433, S. C. [(a) Notwithstanding this decision, a doubt having arisen in my Lord Ferrers' case, whether the Court of King's Bench could issue an attachment against a peer during the sitting of parliament, and execute it upon him *only for a contempt of their court*, the question was moved in the House of Lords; and, after some debate, that House resolved, that neither privilege of peerage, nor of parliament, extended so far as to exempt a peer or lord of parliament from paying obedience to a writ of *habeas corpus* directed to him. See Lords' Journals, 7 Feb. 1757, 8 Jan. 1757; 1 Burr. 631.]

[A husband is entitled to a *habeas corpus* for his wife; and though it be suggested by affidavit, that articles of separation have been executed between them, yet the court will not therefore supersede the writ, or dispense with the production of the party.

R. v. Mary Mead, 1 Burr. 542; R. v. James Winton, 5 T. R. 89.] See The People *ex rel.* Barry v. Mercein, 3 Hill, 399.*g*

If a person be taken in the manner within a forest killing or chasing deer, &c., and the officer, upon tender of sufficient sureties, refuse to bail him, he may have a *habeas corpus* out of the courts at Westminster, which courts may bail him to appear at the next eyre holden for the forest; and

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this the rather, because justice-seats are but seldom holden, and the party, without this remedy, might be obliged to continue a long time in confinement.

4 Inst. 290.

If a person be excommunicated, and the *significavit* do not express that the cause of excommunication is for any of the offences within the statute 5 Eliz. c. 23, the remedy expressly appointed upon that statute is a *habeas corpus*, and upon the return of it the parties shall be discharged.

Vern. 24, R. v. Sneller; and vide Sid. 181; Keb. 683.

If the chief justice of the King's Bench commit one to the marshal by his warrant, he ought not to be brought to the bar by rule, but by *habeas corpus*.

Salk. 359 pl. 4, per Holt, C. J.

A person convicted of horse-stealing, and in jail at St. Albans, was brought by *habeas corpus* and *certiorari* to B. R., and the court demanded of him what he could say why execution should not be done upon the indictment; and because he could not show good cause to stay the execution, he was committed to the marshal, who was commanded to do execution, and the next day he was hanged.

Cro. Car. 176.

If a person be in custody, and also indicted for some offence in the inferior court, there must, beside the *habeas corpus* to remove the body, be a *certiorari* to remove the record; for as the *certiorari* alone removes not the body, so the *habeas corpus* alone removes not the record itself, but only the prisoner with the cause of his commitment; and therefore, although upon the *habeas corpus*, and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment, and bail or discharge, or remand the prisoner, as the case appears upon the return; yet they cannot upon the bare return of the *habeas corpus* give any judgment, or proceed upon the record of the indictment, order, or judgment, without the record itself be removed by *certiorari*; but the same stands in the same force it did, though the return should be adjudged insufficient, and the party discharged thereupon of his imprisonment; and the court below may issue new process upon the indictment.

2 Hal. Hist. 210, 211; Salk. 325; Comb. 2.

But it is otherwise in a *habeas corpus* in civil causes, which suspends the power of the inferior court; so that if they proceed after, their proceedings are *coram non judice*.

Salk. 352.

|| A prisoner of war, though he state himself to be the subject of a neutral power, and to have been forced into the enemy's service, having been captured by them in an English ship, is not entitled to this writ.

R. v. Schiever, 2 Burr. 765.

If an apprentice voluntarily enter into the sea-service, or the service of any other master, his first master is not entitled to sue out a writ of *habeas corpus* to bring him up; for this writ can only be issued at the instance of the party himself who is in custody, or at least with his consent; no man can be brought up as a prisoner (a) without his consent; and in this case the apprentice is not in custody.

R. v. Reynolds, 6 T. R. 497; R. v. Edwards, 7 T. R. 745, S. P.; R. v. Lansdown, 5 East, 38. (a) R. v. Roddam, Cowp. 672.

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When application had been made for the discharge of an impressed seaman before the two years of his protection by 13 G. 2, c. 17, were expired, which was then ineffectual from some ambiguity in the expressions in the affidavit; yet the doubt being afterwards removed by another affidavit, the court granted a writ of *habeas corpus* for the purpose of liberating him, though the two years were then expired.

*Ex parte* Bruce, 8 East, 27.

The court will not grant even a rule *nisi* for a *habeas corpus* to bring up an impressed seaman who claims a protection from the situation he holds if they see reason to think that his appointment to the situation was collusive, and merely for the purpose of giving a claim to the protection.

Anthony Barrow's case, 14 East, 346.¶

4. *How far the Courts have a Discretionary Power in granting or denying it: And therein, of the Habeas Corpus Act.*

Notwithstanding the writ of *habeas corpus* be a writ of right, and what the subject is entitled to, yet the provision of the law herein was in a great measure eluded by the judges being only enabled to award it in term-time, as also by an imagined notion in the judges that they had a discretionary power of granting or refusing it; but especially by the art and contrivance of officers, to whom it was directed, who used great delays in making any return to it.

4 Inst. 290; 3 Buls. 27. β In New York, the allowance of a writ of *habeas corpus* in term-time is matter of sound discretion. *Matter of Ferguson*, 9 Johns. 239; *Yates v. Lansing*, 5 Johns. 282; *Husted's case*, 1 Johns. Ch. 136.β

β Where the person in custody was a soldier of the United States, enlisted in the army, the court refused the writ on the ground that the federal court had jurisdiction of the case, and there was no necessity for the state courts to interfere.

*Matter of Ferguson*, 9 Johns. 239. See 6 Mass. 273; 11 Mass. 63; *Comm. v. Cushing*, 11 Mass. 67, when under like circumstances the writ was allowed.

The Supreme Court of the United States will not grant a *habeas corpus* where a party has been committed for a contempt by a court of the United States of competent jurisdiction; and, if granted, the court will not inquire into the sufficiency of the cause of commitment.

*Ex parte* Kearney, 7 Wheat. 38. See case of *J. V. N. Yates*, 4 Johns. 317; 1 Breese, 266; 1 J. J. Marsh. 575; *Charl.* 136; 1 Blackf. 166.

On a return to *habeas corpus*, setting forth the warrant of the Speaker of the House of Commons, reciting that the parties had been guilty of a contempt and breach of the privileges of the House, not setting forth the particular facts constituting the contempt; held, that the court had no power to discharge from custody, and that it was sufficiently stated by way of recital, and against the House, and that the Speaker had authority to issue the warrant.

*Reg. v. Evans*, 8 Dowl. 451.

The writ of *habeas corpus* does not lie to bring up a person confined in the prison bounds, upon a *capias ad satisfaciendum* in a civil suit.

*Ex parte* Wilson, 6 Cranch, 52.

A *habeas corpus* will not lie to bring up a prisoner out of a county jail for the purpose of voting at an election of a member of parliament.

*Ex parte* Jones, 4 Nev. & M. 340; 2 Adol. & Ellis, 436; 1 Har. & Wol. 7.

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Where a defendant, charged with selling unstamped papers, was in custody, the court granted a *habeas corpus* for the purpose of enabling him to defend in person.

Attorney-General v. Cleave, 2 Dowl. P. C. 668.

A *habeas corpus* to bring up a party in custody under attachment for non-payment of costs, in order to enable him to move in person to set it aside, refused.

Ford v. Nassau, 1 Dowl. N. S. 631.

A is charged with a felony before three magistrates, who, upon hearing evidence, admit him to bail, and, afterwards, upon additional evidence, commit him to prison: held, that A is not entitled to a *habeas corpus* to be discharged out of custody.

*Ex parte Allen*, 3 Nev. & M. 35.g

By the 31 Car. 2, c. 2, commonly called the *habeas corpus* act, reciting, "That great delays had been used by sheriffs, jailers, and other officers, to whose custody any of the king's subjects had been committed for criminal or supposed criminal matters, in making returns of writs of *habeas corpus*, by standing out an *alias* and *pluries*, and sometimes more, and by other shifts, to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the king's subjects have been and hereafter may be detained in prison in such cases, where by law they are bailable, to their great charges and vexation:

Upon this statute Dr. Burn observes two things: 1. That although the constable by his own authority, without any warrant of commitment may carry an offender to jail; and this was the method of securing prisoners before there were any justices of the peace; yet, since the institution of that magistrate, it is better that they be carried before him, to be sent by him to jail by warrant of commitment; otherwise they have a right to be bailed upon this act, whatever the offence may be. 2. That the warrant of commitment ought to set forth the cause specially, that is to say, not for treason or felony in general, but treason *for counterfeiting the king's coin*, or felony *for stealing the goods of such an one to such a value*, and the like, that so the court may judge thereupon whether or no the offence is such for which a prisoner ought to be admitted to bail. Burn, 64.—[Admitted in case of felony by Lord Camden, 3 Wils. 158; 11 St. Tr. 304; but it is said in Lord Montgomery's case, 10 Mod. 334, that a commitment for treason generally is good. And so it was holden in Sir W. Wyndham's case, 3 Vin. Abr. 530; Str. 2. || So a commitment for *treasonable practices* is good. R. v. Despard, 7 T. R. 736.] A commitment for a libel generally is good. 3 Wils. 158; 11 St. Tr. 304.]

"For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters, it is enacted, That whensoever any person or persons shall bring any *habeas corpus* directed unto any sheriff or sheriffs, jailer, minister, or other person whatsoever, for any person in his or their custody, and the said writ shall be served upon the said officer, or left at the jail or prison with any of the under-officers, under-keepers, or deputy of the said officers or keepers, that the said officer or officers, his or their under-officers, under-keepers or deputies, shall within three days after the service thereof as aforesaid (unless the commitment aforesaid were for treason or felony, plainly and specially expressed in the warrant of commitment), upon payment or tender of the charges of bringing the said prisoner to be ascertained by the judge or court that awarded the same, and endorsed upon the said writ, not exceeding 12*d.* per mile, and upon security given by his own bond to pay the charges of carrying back the prisoner if he shall be remanded by the court or judge to which he shall be brought, according to the true intent of this present act,

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and that he will not make any escape by the way, make return of such writ, and bring, or cause to be brought, the body of the party so committed or restrained unto or before the lord chancellor, or lord keeper of the great seal of England for the time being, or the judges or barons of the said court from whence the said writ shall issue, or unto and before such other person or persons before whom the said writ is made returnable, according to the command thereof; and shall then likewise certify the true causes of his detainer or imprisonment, unless the commitment of the said party be in any place beyond the distance of twenty miles from the place or places where such court or person is or shall be residing, and if beyond the distance of twenty miles, and not above one hundred miles, then within the space of ten days; and if beyond the distance of one hundred miles, then within the space of twenty days after such delivery aforesaid, and not longer."

3. "And to the intent that no sheriff, jailer, or other officer, may pretend ignorance of the import of any such writ, it is enacted, That all such writs shall be marked in this manner, *Per statutum tricesimo primo Caroli secundi regis*, and shall be signed by the person that awards the same; and if any person or persons shall be or stand committed or detained as aforesaid for any crime, unless for felony or treason plainly expressed in the warrant of commitment, in the vacation time, and out of term, it shall and may be lawful to and for the person or persons so committed or detained, (other than persons convict or in execution by legal process,) or any one on his or their behalf, to appeal or complain to the lord chancellor, or lord keeper, or any one of his majesty's justices, either of the one bench or of the other, or the barons of the exchequer of the degree of the coif; and the said lord chancellor, lord keeper, justices, or barons, or any of them, upon view of the copy or copies of the warrant or warrants of commitment and detainer, or otherwise upon oath made that such copy or copies were denied to be given by such person or persons in whose custody the prisoner or prisoners is or are detained, are hereby authorized and required, upon request made in writing, by such person or persons, or any on his, her, or their behalf, attested and subscribed by (a) two witnesses who were present at the delivery of the same, to award and grant an *habeas corpus* under the seal of such court, whereof he shall then be one of the judges, to be directed to the officer or officers in whose custody the party so committed or detained shall be, returnable *immediatè* before the said lord chancellor, or lord keeper, or such justice or baron, or any other justice or baron of the degree of the coif of any of the said courts; and upon service thereof as aforesaid, the officer or officers, his or their under-officer, or under-officers, under-keeper or under-keepers, or their deputy, in whose custody the party is so committed or detained, shall, within the times respectively before limited, bring such prisoner or prisoners before the said lord chancellor, or lord keeper, or such justices, barons, or one of them, before whom the said writ is made returnable; and in case of his absence before any other of them, with the return of such writ, and the true causes of the commitment and detainer; and thereupon, within two days after the party shall be brought before them, the said lord chancellor, or lord keeper or such justice or baron, before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his or their recognisance, with one or more surety or sureties, in any sum, according to their discretions, having regard to the quality of the prisoner and nature of the offence, for his or their appearance in the Court of King's Bench the term following, or at the next assizes, sessions,

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or general jail delivery of and for such county, city, or place, where the commitment was, or where the offence was committed, or in such other court where the said offence is properly cognisable, as the case shall require; and then shall certify the said writ, with the return thereof, and the said recognisance or recognisances into the said court where such appearance is to be made; unless it shall appear unto the said lord chancellor, or lord keeper, or justice or justices, or baron or barons, that the party so committed is detained upon a legal process, order, or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace for such matters or offences, for the which by the law the prisoner is not bailable."

(a) One witness, with an affidavit that the other is sick, is sufficient. Comb. 6.

But it is provided, § 4, "That if any person shall have wilfully neglected by the space of two whole terms after his imprisonment to pray a *habeas corpus* for his enlargement, such person so wilfully neglecting shall not have any *habeas corpus* to be granted in vacation time in pursuance of this act."

By § 6. "For the prevention of unjust vexation by reiterated commitments for the same offence, it is enacted, that no person or persons which shall be delivered or set at large upon any *habeas corpus* shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever, other than by the legal order and process of such court wherein he or they shall be bound by recognisance to appear, or other court having jurisdiction of the cause; and if any other person or persons shall knowingly, contrary to this act, recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned, for the same offence, or pretended offence, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of five hundred pounds; any colourable pretence or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid."

And it is further enacted, § 7, "That if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition, in open court, the (a) first week of the term, (b) or the first day of the sessions of *oyer and terminer*, or general jail delivery, to be brought to his trial, shall not be indicted sometime in the next term, sessions of *oyer and terminer*, or general jail delivery, after such commitment; it shall and may be lawful to and for the judges of the Court of King's Bench, and justices of *oyer and terminer* or general jail delivery, and they are hereby required, upon motion to them made in open court the last day of the term, sessions, or jail delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to the judges and justices upon oath made that the witnesses for the king could not be produced the same term, sessions, or general jail delivery; and if any person or persons committed as aforesaid, upon his prayer or petition in open court the first week of the term, or first day of the sessions of *oyer and terminer* and general jail delivery, to be brought to his trial, shall not be indicted and tried the second term, sessions of *oyer and terminer*, or general jail delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment."

(a) Need not enter his prayer the first week, if there be an act of parliament which suspends the *habeas corpus* act, and takes away the power of bailing for a time. Salk.

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103, pl. 2. [For upon occasion of any public alarm, the operation of this clause of the statute hath been suspended by passing an act to empower his majesty to detain for a limited time persons committed by the privy-council for high treason, suspicion of treason, or treasonable practices, who are not to be bailed or tried by any judge or justice of the peace without order from the council, signed by six of the members. See 34 G. 3, c. 54, which was followed by other acts during the war, and by one after the conclusion of the peace, 57 G. 3, c. 3.] (b) That to this purpose the grand sessions of Wales is in the nature of a term, so that the party entering his prayer there on the want of prosecution for a term, B. R. may bail him. Comb. 6.

Provided, § 8, "That nothing in this act shall extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause; but that after he shall be discharged of his imprisonment for such his criminal offence, he shall be kept in custody according to the law for such other suit."

And it is further enacted, § 10, "That it shall and may be lawful to and for any prisoner and prisoners as aforesaid, to move and obtain his or their *habeas corpus*, as well out of the High Court of Chancery or Court of Exchequer, as out the Courts of King's Bench, or Common Pleas, or either of them; and if the said lord chancellor, or lord keeper, or any judge or judges, baron or barons, for the time being, of the degree of the coif, of any of the said courts aforesaid, in the (a) vacation-time, upon view of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, shall deny any writ of *habeas corpus* by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner or party grieved the sum of 500*l.*, to be recovered in manner aforesaid."

(a) And therefore this statute makes the judges liable to an action at the suit of the party grieved in one case only, which is the refusing to award a *habeas corpus* in vacation-time, but leaves it to their discretion, in all other cases, to pursue its directions in the same manner as they ought to execute all other laws, without making them subject to the action of the party, or to any other express penalty or forfeiture. 2 Hawk. P. C., c. 15, § 24.

§ 18. "And to the intent no person may avoid his trial at the assizes or general jail-delivery, by procuring his removal before the assizes, at such time as he cannot be brought back to receive his trial there, it is enacted, That after the assizes proclaimed for that county where the prisoner is detained, no person shall be removed from the common jail upon any *habeas corpus* granted in pursuance of this act, but upon any such *habeas corpus* shall be brought before the judge of assize in open court, who is thereupon to do what to justice shall appertain."

But it is provided, § 19, "That after the assizes are ended, any person or persons detained may have his or her *habeas corpus*, according to the direction and intention of this act."

In the construction of this statute it was holden by two judges, in the absence of one, and contrary to the opinion of the other, that persons committed by rule of court are not entitled to the benefit of this act; and that none are entitled to make their prayer but such as are committed by a warrant of a justice of peace, or secretary of state, and not those committed by rule of court, for that is not within the meaning of the act, which speaks of a commitment by warrant.

10 Mod. 429, || R. v. Leonard. This case is to be found in Sir John Strange's Reports, 142, and the facts were these: The defendant was committed in Trinity vacation by a warrant from the secretary of state, for high treason; he lay by until the last day of Michaelmas term, when he was brought into the Court of King's Bench, charged with an indictment, and re-committed by rule of court. The first day of

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Hilary term he applied to enter his prayer on the *habeas corpus* act; but it was refused by Eyre and Fortescue, Justices, Pratt, C. J., dissenting, and Powys, J., being absent. || It is not requisite that a ground should be laid for a *habeas corpus* by affidavits. State v. Lyon, 1 Cox, 41.g

|| So, it hath been holden, that a person committed for treason done in Scotland is not entitled to enter his prayer under this act; for the prayer is only in order to be tried, and a treason committed in Scotland the courts here cannot try.

R. v. Mackintosh, 1 Str. 308.

A person committed to the Tower for high treason cannot make his prayer either at the Old Baily, or at Hick's Hall, to be bailed or tried.

R. v. Bishop of Rochester, Fort. 101; R. v. Lord North and Grey, Ibid. 103.

If a person applies to enter his prayer, the court will not bail him at the end of the term, if the treason is charged to be in another county than where they sit; but will send him thither by *habeas corpus*, when he must make a new prayer.

R. v. Leeson, 1 Str. 308.||

#### 5. Of the Manner of suing it out, and Form of the Writ.

By the (a) 1 & 2 Ph. & M. c. 13, § 7, "No writ of *habeas corpus* or *certiorari* shall be granted to remove any prisoner out of any jail, or to remove any recognisance, except the same writ be (b) signed with the proper hands of the chief justice, or in his absence, of one of the justices of the court, out of which the same writ shall be awarded or made, upon pain that he that writeth any such writs, not being signed as is aforesaid, to forfeit to our said sovereign lord the king and the queen, for every such writ and writs, five pounds."

(a) And by the 31 Car. 2, c. 2, *supra*, every *habeas corpus* pursuant to that statute shall be marked in this manner, *Per statutum tricesimo primo Caroli Secundi Regis*, and shall be signed by the person that awards the same. [And if not signed, it need not be obeyed. Rex v. Roddam, Cowp. 672.]—For the form of the writ, vide 2 Inst. 53, 54. (b) Vide Salk. 150, pl. 19.

A *habeas corpus* was prayed to the jailer of the county jail of Worcester, to remove one Fox into B. R., to assign errors in person, upon the record of his conviction of a *præmunire* for recusancy; but this was not granted till the writ of error was brought into court under seal, and the record certified.

Mich. 26 Car. 2, Fox's case.

Every *habeas corpus ad subjiciendum* must in term-time be awarded on motion and leave of the court, but a *habeas corpus ad faciendum et recipiendum* is usually granted without motion, as it relates to a civil affair only.

2 Mod. 306.

So, where debt was brought against husband and wife on an obligation sealed by them both, and both being taken by *capias*, it was moved for an *habeas corpus* to bring them into court, to the intent that the husband only might be committed in custody, and the wife discharged; it was holden by the court that this *habeas corpus* for removing the bodies might have been for them without motion; but where the party is committed for a crime, there it ought to be on motion.

Lev. 1, Slater v. Slater.

#### 6. To whom it is to be directed.

Wherever a person is imprisoned by any person whatsoever, whether he



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be one concerned in the administration of justice, as sheriff, jailer, &c., or a private person, such as a doctor of physic, who confines a person under pretence of curing him of madness, &c., the *habeas corpus* must be directed to him.

Godb. 44.

A *habeas corpus* was directed to the chancellor of Durham, by which he was required to make a precept to the sheriff to have the body of J S, with the cause of his commitment, *coram Domino Rege apud Westm.*; the chancellor returned that he made a precept to the sheriff to have his body before him, with the cause of, &c., who accordingly returned the cause and the body before him, and sets out the cause, *et hæc est causa detentionis; et per Hale, C. J.* A *habeas corpus ad faciendum et recipiendum* directed in this manner is good; *secus* of a *habeas corpus ad subjiciendum*; for the king may send his writ to whom he pleases, and he must have an answer of his prisoner wherever he be. There is a great deal of difference between a *habeas corpus ad subjiciendum* and any other *habeas corpus*; for this is the subject's writ of right, in which case the county palatine hath no privilege. In 31 E. 1, a *habeas corpus ad subjiciendum* was directed to the bishop of Durham, who returned that he was a count palatine, and therefore was not bound to answer the writ, for which he was fined 4000*l.* Hil. 17 Car. 1, a *habeas corpus* was directed to the bishop of Durham to return the body of one Rickoby; and resolved, that the writ did well run thither. In this case the writ is directed to the chancellor, to command the sheriff to have his body here; but he commands him to have the body before himself, which is ill. Again, the chancellor doth not return the body to us, for he is no *cujus corpus parat. habeo*; it is not enough for him to say, that the sheriff returned the body to him, but he ought to return it to us here; we have nothing before us; therefore he must be remanded, for he is brought up without a warrant.

Hil. 25 & 26 Car. 2, in B. R.; 3 Keb. 279, S. C.

A *habeas corpus* directed in the disjunctive to the sheriff or jailer is wrong. But, where a man is taken on a warrant of the sheriff, in pursuance of a writ to the sheriff, the *habeas corpus* ought to be directed to the sheriff; for the party is in the custody, and the writ itself must be returned. Otherwise it is, where one is committed to the jailer immediately, as in cases criminal.

R. v. Fowler, Salk. 350; *per Curiam*, Ld. Raym. 586, 618, S. C.

β When a wife voluntarily deserted her husband and went to live with M, her father, and, with his countenance and consent, withheld from her husband the custody of one of their children; held, that a *habeas corpus* lay against M to inquire into the cause of the detention, he being a party in the wrong.

The People *ex rel.* Barry v. Mercein, 3 Hill, 399.*g*

7. *By whom it is to be returned.*

This writ must be returned by the very same person to whom it is directed.

A *habeas corpus* is awarded to the sheriff of —, who before the return leaves the office, and a new sheriff is made, who returns *languidus*; this return is not good, but it ought to be returned by both of them, the first

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that he had the body, and had delivered it to the new sheriff, and the new sheriff may then return *languidus*.

Pasch. 26 Car. 2, Peck and Cresset.

8. Of the Manner of compelling a Return, and the Offence of a false Return.

The method to compel a return to a *habeas corpus* is by taking out an *alias* and *pluries*, (a) which if disobeyed, an attachment issues of course. Also, the court may make a rule on the officer to return his writ, and, if disobeyed, the court may proceed against such disobedience in the same manner as they usually do against the disobedience of any other rule.

F. N. B. 68; 11 H. 4, 86; Mod. 195; 2 Lev. 128, 129; 5 Mod. 21; 12 Mod. 666. (a) [But it hath been long settled that a return must be made to the *first* writ, else an attachment will issue immediately, R. v. James Winton, 5 T. R. 89, without a rule to return the writ. R. v. Wright, 2 Str. 915.]

|| By 31 Car. 2, c. 2, § 5, "If any officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or deputy, shall neglect or refuse to make the return [required by the act,] or to bring the body or bodies of the prisoner or prisoners according to the command of the said writ within the respective times mentioned, or upon demand made by the prisoner or person in his behalf, shall refuse to deliver, or within the space of six hours after demand shall not deliver to the person so demanding, a true copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are hereby required to deliver accordingly; all and every the head jailers and keepers of such prisons, and such other person in whose custody the prisoner shall be detained, shall for the first offence forfeit to the prisoner or party grieved the sum of 100*l.*, and for the second offence, the sum of 200*l.*, and shall be and is hereby made incapable to hold or execute his said office; the said penalties to be recovered by the prisoner or party grieved, his executors or administrators, against such offender, his executors or administrators, by any action of debt, suit, bill, plaint, or information, in any of the king's courts at Westminster, wherein no essoin, protection, privilege, injunction, wager of law, or stay of prosecution by *non vult ulterius prosecute*, or otherwise, shall be admitted or allowed, or any more than one imparlance; and any recovery or judgment at the suit of any party grieved shall be a sufficient conviction for the first offence, and any after-recovery or judgment at the suit of a party grieved, for any offence after the first judgment, shall be a sufficient conviction to bring the officers or persons within the said penalty for the second offence."

A constable, who has the party in his custody, is an officer within the above act, and obliged to give a copy of the warrant of commitment.

Hudson v. Ash, 1 Str. 167.||

A *habeas corpus* went to the Stannary court, to which an insufficient return was made, and therefore disallowed. And *per Cur.* the warden of the Stannaries must be amerced, and you may go to the coroners and get it affeered, and estreat it, and an *alias habeas corpus* must go for the insufficiency of the return of the first, and upon that the body and cause must be removed up; if another excuse be returned, we will grant an attachment.

Salk. 350.

And as a jailer, &c., is obliged to bring up the prisoner at the day prefixed by the writ, it is no excuse for not obeying a writ of *habeas corpus ad subjiciendum*, that the prisoner did not tender the fees due to the jailer; nor yet

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is the want of such tender an excuse for not obeying a writ of *habeas corpus ad faciendum et recipiendum*; but, if the jailer bring up the prisoner by virtue of such *habeas corpus*, the court will not turn him over till the jailer be paid all his fees.

2 Jon. 178; March, 89; Keb. 272, 280; 2 Show. 172.

For a false return there is regularly no remedy against the officer, but an (a) action on the case at the suit of the party grieved, and an information or indictment at the suit of the king.

6 Mod. 90; Salk. 349. (a) But no action lies until the return be filed. Salk. 352.

But it has been holden, that if a jailer return one *languidus* when the party himself brings his *habeas corpus*, and is in good health, an attachment shall be issued against him; *secùs*, if the *habeas corpus* was brought by another.

[*Qu.* If any reasonable difference?]

|| The court will in some cases enlarge the time for making a return; as, where upon a *habeas corpus* directed to the keeper of a private mad-house, it appeared that the person confined was a lunatic, and not fit to be produced in court, and that the relations were applying for a commission of lunacy.

R. v. Clarke, 3 Burr. 1362.  $\beta$  Where the writ is only served the preceding day, although returnable immediately, the court, on application for an attachment, refused it, there being no ground for supposing that a return would not be made. *Stockdale v. Hansard*, 8 Dowl. 474.g

By 56 G. 3, c. 100, § 2, "If the person or persons to whom any writ of *habeas corpus* shall be directed according to the provision of this act, upon service of such writ, either by the actual delivery thereof to him, her, or them, or by leaving the same at the place where the party shall be confined or restrained, with any servant or agent of the person or persons so confining or restraining, shall wilfully neglect or refuse to make a return or pay obedience thereto, he, she, or they shall be deemed guilty of a contempt of the court under the seal whereof such writ shall have issued, and it shall be lawful to and for the said justice or baron before whom such writ shall be returnable, upon proof made by affidavit of wilful disobedience of the said writ, to issue a warrant under his hand and seal, for the apprehending and bringing before him, or before some other justice or baron of the same court, the person or persons so wilfully disobeying the said writ, in order to his, her, or their being bound to the king's majesty, with two sufficient sureties, in such sum as in the warrant shall be expressed, with condition to appear in the court of which the said justice or baron is a judge, at a day in the ensuing term, to be mentioned in the said warrant, to answer the matter of contempt with which he, she, or they are charged; and in case of neglect or refusal to become bound as aforesaid, it shall be lawful for such justice or baron to commit such person or persons so neglecting or refusing, to the jail or prison of the court of which such justice or baron shall be a judge, there to remain until he, she, or they shall have become bound as aforesaid, or shall be discharged by order of the court in term time, or by order of one of the justices or barons of the court in vacation; and the recognisance or recognisances to be taken thereupon shall be returned and filed in the same court, and shall continue in force until the matter of such contempt shall have been heard and determined, unless sooner ordered by the court to be discharged. Provided, that if such writ shall be awarded solate in the vacation by any of the said justices or barons,

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that, in his opinion, obedience thereto cannot be conveniently paid during such vacation, the same shall and may, at his discretion, be made returnable in the court of which the said justice or baron shall be a justice or baron, at a day certain in the next term; and the said court shall and may proceed thereupon, and award process of contempt in case of disobedience thereto, in like manner as upon disobedience to any writ originally awarded by the said court. Provided also, that if the said writ shall be awarded by the Court of King's Bench, or the Court of Common Pleas, or the Court of Exchequer, in the said countries respectively, which last-mentioned court shall have like power to award such writs as the respective Courts of King's Bench and Common Pleas, in each of the said countries now have in term, but so late that, in the judgment of the court, obedience thereto cannot conveniently be paid during such term, the same shall and may, at the discretion of the said court, be made returnable at a day certain in the then next vacation, before any justice or baron of the degree of the coif, or, if in Ireland, before any justice or baron of the same court, who shall and may proceed thereupon in such manner as by this act is directed concerning writs issuing in and made returnable during the vacation.

By § 6, "The several provisions made in this act, touching the making writs of *habeas corpus*, issuing in time of vacation, returnable into the said courts, or for making such writs awarded in term-time returnable in vacation, as the cases may respectively happen, and also for making wilful disobedience thereto a contempt of the court, and for issuing warrants to apprehend or bring before the said justices or barons, or any of them, any person or persons wilfully disobeying any such writ, and in case of neglect or refusal to become bound as aforesaid, for committing the person or persons so neglecting or refusing, to jail aforesaid, respecting the recognisance to be taken as aforesaid, and the proceeding or proceedings thereon, shall extend to all writs of *habeas corpus* awarded in pursuance of the said act passed in England in the thirty-first year of the reign of King Charles the Second, or of the said act passed in Ireland in the twenty-first and twenty-second years of his present majesty, in as ample and beneficial a manner as if such writs and the said cases arising thereon had been hereinbefore specially named and provided for respectively."

9. *What Matters must be returned together with the Body of the Party.*

As upon the return of the writ the court is to judge, whether the cause of the commitment and detainer be according to law or against it; so the officer or party, in whose custody the prisoner is, must, according to the command of the writ, certify on the return thereof the day, cause of caption and detainer.

Vaugh. 137.

A *habeas corpus* was directed to remove one J S, to which no return was made; then an *alias* was granted, and it was returned *quod traditur in ballium ante adventum istius brevis*; and the truth of the case was, that between the first and second writ the party was bailed; *et per Cur.* after an *habeas corpus* delivered, the party cannot be bailed; and if it happens otherwise, yet the cause of the commitment ought to be returned, though the body cannot be brought into court; and in this case the officer having on the first writ of *habeas corpus* taken 5*l.* to have the body in court, and yet made no return, the court granted an attachment against him.

Hil. 25 and 26 Car. 2, in *B. R. Salmon v. Slade*.

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Where a commitment is in court to a proper officer there present, there is no warrant of commitment; and therefore to a *habeas corpus* he cannot return a warrant *in hæc verba*, but must return the truth of the whole matter, under peril of an action; but if the party be committed to one that is not an officer, there must be a warrant in writing, and where there is one it must be returned; for otherwise it would be in the power of the jailer to alter the case of the prisoner, and make it either better or worse than it is upon the warrant; and if he may take upon him to return what he will, he makes himself judge; whereas the court ought to judge, and that upon the warrant itself.

Salk. 349. See *R. v. Mountnorris*, 1 Ir. T. R. 464, this case cited and approved.

If a person in custody on an *excommunicato capiendo* brings a *habeas corpus*, the writ of *excommunicato capiendo* itself must be returned, as well as the sheriff's warrant for taking him, because the warrant may be wrong when the writ is right; and though the warrant be wrong, yet if the writ is right, the party is rightful in custody of the sheriff.

Salk. 350.

Upon a *habeas corpus* directed to the constable of Windsor Castle, to remove the body of one Mr. Taylor, a barrister; at the day of the return of the writ, a soldier brought the prisoner into court, and the writ and the warrant by which he was committed; but the court held it no manner of return, for it ought to be entered in *Latin*,\* and engrossed in due form.

Pash. 18, Car. 2, Taylor's case. \*Pleadings, proceedings, &c., are now in English, by virtue of 4 G. 2, c. 26.

β Where the sheriff returned to a writ of *habeas corpus*, that he held the prisoner by order of the Court of Chancery, which order referred to a former attachment, setting forth the grounds of commitment, and from which the prisoner had been discharged by a judge of the Supreme Court in vacation, on another *habeas corpus*, and the sheriff also returned the attachment and proceedings prior to the last order of commitment; held that the sheriff could not return the true cause of the caption without also stating the original attachment and subsequent orders; and that the whole might be received and examined into by the court.

Case of *J. V. N. Yates*, 4 Johns. 317. See 3 Wilson, 188; 14 East, 1; 2 Bay, 182; 6 Wheat. 204; 7 Wheat. 38; 1 Breese, 266; 1 J. J. Marsh. 575; Charl. 136; 1 Blackf. 166; 9 Johns. 395; 5 Johns. 282; 6 Johns. 337; 15 Johns. 156.

When the return to a *habeas corpus* directed to M L as commander of the United States' troops at Sackett's Harbour, and by the title of "general division of the army of the United States," was that "the within named Samuel Stacy is not in my custody," it was held to be an evasive return. If the return was intended to excuse himself for not producing the body, it should have been stated that Stacy was not in his possession or power.

In the matter of Samuel Stacy, Jr., 10 Johns. 328.g

10. *Where the Return shall be said to be certain and sufficient to warrant the Commitment.*

It is said in general, that upon the return of the *habeas corpus* the cause of the imprisonment ought to appear as specifically and certainly to the judges, before whom it is returned, as it did to the court or person authorized to commit.

Vaugh. 137.

For if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge him, and therefore the certainty

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of the commitment ought to appear; and the commitment is liable to the same objection where the cause is so loosely set forth, that the court cannot adjudge whether it were a reasonable ground of imprisonment or not.

But for this, vide head of *Commitment*, head of *Bail* in Criminal Cases, and *Hal. Hist.* P. C. 584.

Rudyard, an attorney of C B, being committed to Newgate by the lord mayor and Sir John Robinson, for refusing to give security for his good behaviour, was brought by *habeas corpus* to the C B, and it was returned as the cause of his commitment, that whereas he had been complained of to the lord mayor and Sir John Robinson for several misdemeanors, particularly for inciting his majesty's subjects to the disobedience of his majesty's laws, more particularly of an act of parliament made in the 22d year of his reign, against seditious conventicles; and whereas he had been examined before them for abetting such as frequented seditious conventicles, contrary to the statute 22 Car. 2, c. 1, and upon his examination they found cause to suspect him, and therefore they requested sureties of him for his good behaviour, and for refusal committed him. Wild, Justice, was of opinion, that by abetting such as frequented seditious conventicles, must be intended abetting them in that particular, and signifies as much as encouraging them to frequent such conventicles, and finding cause to suspect him, &c., (which cannot now be questioned, for the return is admitted,) they may well send him to prison, and therefore he ought to be remanded. But Vaughan, C. J., Tyrrell, and Archer, were of a contrary opinion: 1. Because it does not appear but that he might abet the frequenters of conventicles in a way which the law allows, as by soliciting an appeal for them, or the like. 2. To say that he was complained of, or that he was examined, is no proof that he was guilty; and then to say that they had cause to suspect him, is too cautious; for who can tell what they may count a cause of suspicion, and how can that ever be tried? At this rate they would have arbitrary power, upon their own allegation, to commit whom they pleased, whereas they cannot require sureties for any man's behaviour, and consequently, not commit for refusal, unless the justices have any thing against him of their own knowledge, or by proofs of witnesses, that tend to a breach of the peace. Upon this return Archer declared his opinion to be, that he should not be remanded, but give his own recognisance to appear in court the next term, to answer any thing that should be alleged against him. But Vaughan and Tyrrell were for his absolute discharge; for seeing by the return it did not appear there was any cause for his commitment, they thought they had no reason to require a recognisance of him. Thereupon Wild moved that he could not be discharged, there being but two for it. But Archer replied, that it had been several times ruled, that where there were three opinions, that was taken to be *per Cur.* which had two of the judges for it: And accordingly Rudyard was discharged. Vaughan and Tyrrell made another objection to the return, viz.: that they should have expressed the sum in which they required him to give security, (which they had not done,) for they said that those persons that might be willing to be bound for him in 40*l.* might not be willing to be bound for him in 100*l.* &c., and therefore till he knew the sum he could not know whom to provide. But as to this it was said, that Rudyard had absolutely refused to give any security, and therefore it was to no purpose to tell him of the sum; if he had consented to give security, then the justices ought to have told him the sum.\*

*Trin.* 22 Car in C. B., Rudyard's case. \*A return that the defendant was com-

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mitted for back-bearing and carrying away a deer, is good after conviction, though it does not say *unlawfully*; but not before conviction. Fort. 272. That before delivery of the writ he had delivered the woman to her husband, and knows not where she is; a good return. R. v. Wright, Str. 915.—That at the coming of the writ, defendant was not in the keeper of the prison's custody, a good return. And. 281. So said by Strange, *arguendo*.—That before the coming of the writ, defendant was discharged out of his custody by an order of sessions, without saying what sessions, what order, or that he was discharged by due course of law; good for the purpose of filing the writ. Ibid. A return that the African Company had retained the defendant in their service, and sent him to the Savoy, till he should embark, is bad; and defendant was discharged, and an information ordered against the colonel and the keeper of the Savoy. R. v. Drew, Str. 404.—[A return that "the prisoner is detained in custody, being charged upon oath with being a deserter from the R. L. regiment;" is insufficient; it ought to appear that he was committed by some person having authority to commit. R. v. Mountnorris, Ir. T. R. 460.]—A return that the defendant was committed by an order of two justices of the peace, for that he, being overseer of the poor, had not accounted as by statute directed, and had not accounted before them, bad; he might have accounted before others. Fort. 272. [A return that "he had not at the time of receiving the writ, nor hath he since had the body of A B detained in his custody, so that he *could not* have her, &c." is bad. R. v. James Winton, 5 T. R. 89. See an observation on the kind of certainty required in these returns, Dougl. 159.—If the power of commitment be at common law, it is not necessary to state it in the return. In Crosby's case, 3 Wils. 188, 2 Bl. Rep. 754, the power of the Speaker of the House of Commons was not alleged. Dougl. 150, *arguendo*.] [A return by an officer that the party is in his custody under the sentence of a court of competent jurisdiction to inquire the offence, and to pass such a sentence, seems to be sufficient, without setting forth the particular circumstances necessary to warrant the sentence. R. v. Suddis, 1 East, 306.]

11. *Whether the Party can suggest any Thing contrary to the Return.*

Although it seem to be agreed, that no one can in any case controvert the truth of the return to a *habeas corpus*, or plead or suggest any matter repugnant to it; yet it hath been holden, that a man may confess and avoid such a return by admitting the truth of the matters contained in it, and suggesting others not repugnant, which take off the effect of them.

Cro. Eliz. 821; 5 Co. 71 b; 2 Hawk. P. C. c. 15, § 78.  $\beta$  If the return of a *habeas corpus* be legally sufficient, the court cannot try the facts upon affidavits, but must take it as true. Renney v. Mayfield, 4 Hayw. 165.g

Upon a *habeas corpus* it was returned, that Swallow, a citizen of London, was fined for alderman, and was committed for his fine by the judgment of the court in London. Swallow alleged, that he was an officer of the mint, and by an ancient charter of privilege granted to the minters or moneyers, he ought to be exempted. It was at first doubted whether he might not plead this to the return, it being a matter consistent with it. Upon the statute W. 2, it is held the parties may come in and plead, and so upon 5 Eliz., but here there is a difference; for he might have pleaded this in the court below, but now that is past, and here is a judgment and execution. Another day Swallow brought into court a writ of privilege upon that charter, and the recorder prayed that it might not be allowed against the ancient customs of the city; for if such a way might exempt men, they should have little benefit by fines in such cases. But *per Cur.* the privilege ought to be allowed, for it is very ancient, and it appears he has an office of necessary attendance elsewhere, which makes the privilege reasonable. The king may by his charter exempt from juries, if there be enough besides, much more here; and if there be not enough besides, upon showing that, the privilege ought to be suspended; and Swallow may be discharged by this court now as well as he could at first, or as if he had

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taken upon him the aldermanship. This court is supreme and mandatory in such cases. And he was accordingly discharged.

Pasch. 18 Car. 2, in B. R.; Swallow's case, Sid. 287; 2 Keb. 50, 54, &c. β When the return to a *habeas corpus* is legally sufficient the court will take it to be true. *Rebecca Renney v. Mayfield*, 4 Hayw. 165.g

Also the court will sometimes examine by affidavit the circumstances of a fact, on which a prisoner brought before them by a *habeas corpus* hath been indicted, in order to inform themselves, on examination of the whole matter, whether it be reasonable to bail him or not. And agreeably hereto, (a) where one Jackson, who had been indicted for piracy before the sessions of Admiralty on a malicious prosecution, brought his *habeas corpus* in the said court, in order to be discharged or bailed, the court examined the whole circumstances of the fact by affidavits; upon which it appeared that the prosecutor himself, if any one, was guilty, and carried on the present prosecution to screen himself: and thereupon the court, in consideration of the unreasonableness of the prosecution, and the uncertainty of the time when another sessions of Admiralty might be holden, admitted Jackson to bail, and committed the prosecutor till he should find bail to answer the facts contained in the affidavits.

5 Mod. 322, 454; 2 Jon. 222. (a) Trin. 4 Geo. 1.

|| By 56 G. 3, c. 100, § 3, "In all cases provided for by this act, although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for the justice or baron before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation (in cases where an affirmation is allowed by law,) and to do therein as to justice shall appertain; and if such writ shall be returned before any one of the said justices or barons, and it shall appear doubtful to him, on such examination, whether the material facts set forth in the said return, or any of them, be true or not, in such case it shall and may be lawful for the said justice or baron to let to bail the said person so confined or restrained, upon his or her entering into a recognisance with one or more sureties, or in case of infancy or coverture, or other disability, upon security by recognisance in a reasonable sum to appear in the court of which the said justice or baron shall be a justice or baron upon a day certain in the term following, and so from day to day as the court shall require, and to abide such order as the court shall make in and concerning the premises; and such justice or baron shall transmit into the same court the said writ and return, together with such recognisance, affidavits, and affirmations; and thereupon it shall be lawful for the said court to proceed to examine into the truth of the facts set forth in the return in a summary way, by affidavit or affirmation, (in cases where by law affirmation is allowed,) and to order and determine touching the discharging, bailing, or remanding the party."

And by § 4. "The like proceedings may be had in the court for controverting the truth of the return to any such writ of *habeas corpus* awarded as aforesaid, although such writ shall be awarded by the said court itself, or be returnable therein."||

#### 12. Whether any Defect in the Return may be amended.

It seems that before the return is filed, any defect in form, or the want of an averment of a matter of fact may be amended; but this must be at the



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peril of the officer, in the same manner as if the return were originally what it is after the amendment.

Anon. Mod. 102.

But after the return is filed it becomes a record of the court, and cannot be amended.

R. v. Mountnorris, 1 Ir. T. R. 460, S. P.

So after a rule to have the return filed; as where a *habeas corpus, alias et pluries* was directed to Sir Robert Viner, mayor of London, to have the body of Bridget, daughter and heir of Sir Thomas Hyde, deceased; and upon the *pluries* he returned *quod tempore receptionis hujus brevis nec unquam postea non fuit infra custodiam meam*; and the counsel of the lord mayor expounded this return that she was within the house of the lord mayor, but not detained in custody *prout per breve supponitur; et per Cur.* this is an insufficient return; for he ought to say not only *tempore receptionis hujus brevis, sed alicujus*, upon a return of a *pluries*. Then a question was, if the return could be amended; for though a rule was made that the return should be filed, yet this was not actually done; but *per Cur.* this is filed by the rule of the court, and after cannot be amended: and this return the court held to be equivocal; for it is well enough known that she is not detained *in ferris*; but though she hath the liberty of the house, if she cannot go out of the house, or not without a keeper, she is within his custody; and the court shall adjudge what sort of custody is intended by the writ.

Hil. 26 & 27 Car. 2, in B. R.; Emerton v. Sir Rob. Viner, 2 Lev. 128; 3 Keb. 434, 447, 470, 504, S. C.; Freem. 389, 401, 522, S. C.; 3 Mod. 164, S. C. cited. See a full account of this case in Wilmot's "Opinions and Judgments," p. 113, &c.

β Until impeached, the return need not be supported by affidavits, and where it erroneously, but not wilfully misstated a fact immaterial to justify the prisoner's detention, the court allowed the return to be amended, and refused an attachment for such false statements.

Canadian Prisoners' case, 1 Perr. & D. 516; S. C. 5 Mees. & W. 32; 9 Adol. & Ellis. 731.*g*

13. *What is to be done with the Prisoner at the Return; and therein, of bailing, discharging, or remanding him.*

Upon the return of the *habeas corpus* the prisoner is regularly to be discharged, (a) bailed or remanded; but, if it be doubtful which the court ought to do, it is said that the prisoner may be bailed to appear *de die in diem* till the matter is determined.

5 Mod. 22; Style, 16. β Although the court are bound to free the person of the citizen from all restraints by *habeas corpus*, yet they are not bound to decide who is entitled to the guardianship of an infant, or to deliver him to the custody of any particular person, although they have the discretion to do so if they think proper. Comm. v. Addicks, 5 Binn. 520; In the matter of Marg. Waldron, 13 Johns. 418; In the matter of McDowells, 8 Johns. 328. (a) A discharge on a *habeas corpus*, where the judge has no jurisdiction is void. 15 Johns. 156.*g*

By the petition of right, or (b) 17 Car. 1, c. 10, the court must, within three days after the (c) return of the *habeas corpus*, either discharge, bail, or remand the prisoner. But it seems that a commitment by the Court of King's Bench to the Marshalsea is remanding, being an imprisonment within the statute.

(b) By the *habeas corpus* act, 31 Car. 2, c. 2, § 3, the lord chancellor, &c., shall within two days after the return of the *habeas corpus* take order, &c., and bail or remand the prisoner. (c) That is, after the return filed, for before then there is nothing before the court. 5 Mod. 22.

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Also it hath been ruled, that the Court of King's Bench may, after the return of the *habeas corpus* is filed, remand the prisoner to the (a) same jail from whence he came, and order him to be brought up from time to time, till they shall have determined whether it is proper to bail, discharge, or remand him absolutely.

Vent. 330. (a) As was done in Rob. Peyton's case, who was remanded to the Tower. Vent. 346.  $\beta$  Time will be allowed in a proper case to enable the defendant to bring testimony to meet a case proved on a *habeas corpus*. State v. Lyon, 1 Coxe, 403. *g*

And though in doubtful cases the court is to bail or discharge the party on the return of the *habeas corpus*; yet, if a person be convicted, and the conviction on the return of the *habeas corpus* appear only defective in point of form, it is at the election of the court either to discharge the party, or oblige him to bring his writ of error.

Salk. 348, pl. 2; 5 Mod. 19, 20. [Where there is a conviction, the court will not discharge on the warrant of commitment, without having the conviction before them. R. v. Elwell, Bart. 2 Str. 794.]

$\beta$  The Circuit Court of the United States cannot, on a *habeas corpus*, discharge a foreign secretary of legation, committed under process from a state court, governor, or judge. (b) And the Supreme Court has no jurisdiction to discharge a party arrested by process out of the Common Pleas. (c)

(b) *Ex parte* Cabrera, 1 Wash. C. C. R. 232. (c) *Republica v. Gaoler*, 2 Yeates, 349; *Comm. v. Lecky*, 1 Watts, 66. See *Comm. v. Deacon*, 8 S. & R. 72.

The judges of the state courts have authority to issue writs of *habeas corpus* to bring up the bodies of prisoners committed under the asserted authority of the United States.

*Ex parte* Lockington, Sup. Court, Nov. 1813, pamph.

When a court has refused to discharge one of its own suitors from arrest, on the ground of privilege, the Supreme Court will relieve on *habeas corpus*.

*Comm. v. Hambricht*, 4 S. & R. 149. *g*

|| Though the warrant of commitment be defective, yet if, upon the depositions returned, the Court of B. R. see that a felony has been committed, and that there is a reasonable ground of charge against the prisoner, they will not bail, but remand him. And to prevent a similar application to another court or judge for a *habeas corpus*, they will not remand the prisoner in general terms to the former custody, but will, by their rule, discharge him from his imprisonment under the informal warrant, and then commit him regularly to the same custody.

R. v. Marks, 3 East, 157, 1 Barn. & Ald. 575.  $\beta$  On a *habeas corpus*, the court will only inquire whether the warrant of commitment states a sufficient probable cause to induce a belief that the person charged has committed the offence stated. *United States v. Johns*, 4 Dall. 413. *g*

Though the original warrant of commitment be irregular, yet, if a regular warrant of detainer for the same offence issued subsequently to the writ of *habeas corpus* be returned, the court will remand the defendant.

R. v. Gordon, *Ibid.* 572, n.

Where to a *habeas corpus* to bring up the body of an apprentice, the keeper of the house of correction returned a regular conviction of the party by two magistrates on the st. 20 G. 2, c. 19, for a misdemeanor, in absenting himself as an apprentice from his master's service: it is no answer to show by affidavit that the party had bound himself when an infant to serve till twenty-five, and that when he came of age, he elected to avoid the indentures; after which the offence imputed to him had been committed; for

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this was matter proper to be shown to the magistrates below, who, if it were true, acted at their own peril in committing the party; but this court has no power to discharge an apprentice (*a*) from his indentures, and are bound by the return of a regular conviction, where the objection does not appear on the face of the return, to remand the party.

*Ex parte* Gill. 7 East, 376. (*a*) *Ex parte* Davis, 5 T. R. 715, *contr.* but so reported by mistake.||

β Where a prisoner is brought on a *habeas corpus*, before a court or judge, as a fugitive from justice, by a warrant from the executive of one state, on the requisition of the executive of another state, under the constitution and laws of the United States, such court or judge will not inquire as to the probable guilt of the accused; the only inquiry is whether the warrant under which he is arrested states that the fugitive has been demanded by the executive of the state from which he is alleged to have fled, and that a copy of the indictment or affidavit, charging him with having committed treason, felony, or other crime, certified as authentic by the executive demanding him, have been presented.

In the matter of Clarke, 9 Wend. 212.*g*

If on the return of the *habeas corpus* it appears that the contest relates to the right of guardianship, though the court will not determine that point, yet will it set the infant at liberty, so as to let him choose where he will go till that matter is determined; or if there be any danger of abuse, will order him into such hands as will take effectual care of him.

3 Keb. 526; 2 Lev. 128.

A young lady, a minor, who was marriageable, and lived with her guardian, was brought up by a *habeas corpus* taken out by a man who claimed her as his wife: she denied the marriage, and expressed a wish to remain with her guardian, which the court ordered, and hearing that the man had design to seize her, sent a tip-staff home with her to protect her.

R. v. Clarkson, 1 Str. 444.

A child, so young as to be incapable of exercising any judgment of its own, was delivered by the court into the custody of the *legal* guardian appointed by the father's will.

R. v. Johnson, 1 Str. 579; 2 Ld. Raym. 1334, S. C.

On a *habeas corpus* sued out by a father in order to have his son, an infant, who was kept by an aunt, delivered to him, the court having consulted the boy's inclinations, and entertaining a bad opinion of the father's design in applying for the custody of the child, refused to give him up to him.

R. v. Smith, 2 Str. 982.

β In general the father is entitled to the custody of his children, but when the parents live apart under a *voluntary* separation, and the father has left an infant child in the custody of its mother, such custody will not be transferred to the father by the process of *habeas corpus*, when the infant is of tender age, and of a delicate and sickly habit, peculiarly requiring the mother's care and attention; particularly if the qualifications of the father for the proper discharge of the parental office are not equal to those of the mother.

Mercein v. The People *ex rel.* Barry, 25 Wend. 64.

Where a girl between the ages of eleven and twelve years, whose father was dead, was committed by her mother to the respondent, a member of a

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society of Shakers, on a verbal contract for her support and education, and afterwards a guardian was appointed who claimed the custody of the child, and obtained a writ of *habeas corpus* directed to the respondent, the court refused to determine, in this summary process, upon the rights of the mother and of the guardian, and ordered that the child might remain with the respondent or go at large, at her election.

Commonwealth v. Hammond, 10 Pick. 274.*g*

A young lady of full age having been decoyed from her father in order to be married to a mean person, and brought back by the father's means to his house, a *habeas corpus* was sued out by one of the decoyers; but upon the court being told by the young lady that she was desirous of going back to her father, they said she was at liberty to do so.

R. v. Clarke, 1 Burr. 606.

On a *habeas corpus* by the father of a kept mistress, aged eighteen, directed to her keeper, the court discharged her from all restraint, and gave her liberty to go where she pleased.

R. v. Sir F. Delaval, 3 Burr. 1434.

On a *habeas corpus* by a husband for his wife, it appeared that articles of separation had been executed between them in consideration of money received by the husband, who had also covenanted not to molest the wife, or any one with whom she might live: the court held this agreement a formal renunciation by the husband of his marital right to seize her, and force her back to live with him, and told the lady that she was at liberty to go where, and to whom she pleased.

R. v. Mead, 1 Burr. 542.

So, where the wife had fled to her own family for protection from her husband who had used her very ill, and upon her appearance on the return of the writ she swore the peace against him, the court refused to deliver her up to him.

Anne Gregory's case, 4 Burr. 1991.

Where a defendant was brought up from the Admiralty, there charged with embezzling the goods of a ship; on affidavit of a cause of action on a note in B. R., that court took him from the Admiralty, and delivered him into the custody of their marshal, for the cause in the Admiralty court, they said, might as well be followed in an action of trover.

Rutherford v. Scott, 2 Str. 936.

A person committed by a secretary of state to the custody of a messenger on suspicion of high treason, and kept there two years, was discharged, because the attorney-general would not undertake to prosecute directly.

R. v. Fitzgerald, 1 Wils. 254.

The Court of King's Bench cannot remand a person to the custody of a king's messenger, but must commit him to their marshal.

R. v. Shebbeare, 1 Burr. 460.

Where a sane person confined by her husband in a mad-house, was brought up, and intended to demand the peace, but had not articles ready stamped, the court permitted her to go away with a friend, he undertaking to produce her.

R. v. Turlington, 2 Burr. 1115.—In the year 1757, the above act of the 31 Car. 2, c. 2, came under discussion in both houses of parliament, upon the following occasion: A gentleman having been impressed before the commissioners under a pressing-act

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passed in the preceding session, and confined in the Savoy, his friends made application for a writ of *habeas corpus*, which produced some hesitation and difficulty; for, according to the above statute, the privilege relates only to persons committed for criminal, or supposed criminal matters; and this gentleman did not stand in that predicament. Before the question could be determined, he was discharged, in consequence of an application to the secretary at war; but the nature of the case seeming to point out a defect in the act, a bill for giving a more speedy remedy to the subject upon the writ of *habeas corpus*, was prepared, and presented to the House of Commons. It imported, that the several provisions made in the above act of 31 Car. 2, for the awarding of writs of *habeas corpus* in cases of commitment, or detainer for any criminal or supposed criminal matter, should in like manner extend to all cases where any person, not being committed or detained for any criminal or supposed criminal matter should be confined, or restrained of his or their liberty, under any colour or pretence whatsoever; that upon oath made by such person so confined or restrained, or by any other person on his behalf, of any actual confinement or restraint, and that such confinement or restraint, to the best of the knowledge and belief of the person so applying, was not by virtue of any commitment or detainer for any criminal or supposed criminal matter; a *habeas corpus* directed to the person or persons so confining or restraining the party, should be granted in the same manner as is directed, and under the same penalties as are provided by the said act in the case of persons committed or detained for any criminal or supposed criminal matter; that the person before whom the party should be brought by virtue of a *habeas corpus* granted in the vacation-time under the authority of this act, might and should, within three days after the return made, proceed to examine into the facts contained in such return, and into the cause of such confinement and restraint, and thereupon either discharge, or bail, or remand the party so brought, as the case should require, and as to justice should appertain. The rest of the bill related to the return of the writ in three days, and the penalties upon those who should neglect or refuse to make the return, or to comply with any other clause of this regulation. The bill, and the arguments for and against it, may be seen in the Appendix to vol. 7, Debrett's Debates, from 1743 to 1774. || There is a more full and correct copy of the former in Wilnot's "Opinions and Judgments," p. 77, note. || The bill was soon passed by the Commons; but in the House of Lords, it was thrown out at the second reading, and the judges were ordered to prepare a bill to extend the power of granting writs of *habeas corpus ad subjiciendum* in vacation-time, in cases not within the statute of 31 Car. 2, c. 2, to all the judges of his majesty's courts at Westminster, and to provide for the issuing of process in vacation-time to compel obedience to such writs; and that in preparing such bill they take into consideration, whether in any, and what cases, it may be proper to make provision that the truth of the facts contained in the return to a writ of *habeas corpus* may be controverted by affidavits or traverse, and so far as it shall appear to be proper, that clauses be inserted for that purpose, and that they lay such bill before the house in the beginning of the next session of parliament. || A bill to this effect was accordingly prepared by the judges, but the House never called for it. See a copy of it in Dodson's Life of Sir Michael Foster, p. 68. ||

When the above bill was before the lords, the following questions were proposed to the judges:—1st, Whether, in cases not within the act of 31 Car. 2, c. 2, writs of *habeas corpus ad subjiciendum*, by the law as it now stands, ought to issue of course, or upon probable cause verified by affidavit?—2d, Whether in cases not within the said act, such writs of *habeas corpus*, by the law as it now stands, may issue in vacation by fiat from a judge of the Court of King's Bench, returnable before himself?—3d, What effect will the several provisions proposed by this bill, as to the awarding, returning, and proceeding upon returns to such writs of *habeas corpus*, have in practice? and how much will the same operate to the benefit or prejudice of the subject?—4th, Whether at the common law, and before the statute of *habeas corpus* in the 31st of King Charles 2, any and which of the judges could regularly issue a writ of *habeas corpus ad subjiciendum* in time of vacation, in all or in what cases particularly?—5th, Whether the judges at the common law, and before the said statute, were bound to issue such writ of *habeas corpus* in time of vacation, upon the demand of any person under any restraint? or might they refuse to award such writ, if they thought proper?—6th, Whether the judges at the common law, and before the said statute, were bound to make such writs issued in time of vacation returnable *immediatè*? and could they enforce obedience to such writ issued in time of vacation, if the party served therewith should neglect or refuse to obey the same, and by what means?—7th, Whether, if a judge, before the said statute, should have refused to grant the said writ on the demand of any person under any restraint, had the subject any remedy at law, by action or otherwise, against the

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judge for such refusal?—8th, Whether in case a writ of *habeas corpus ad subjiciendum* at common law be directed to any person returnable *immediate*, such person may not stand out an *alias* and *pluries habeas corpus*, before due obedience thereto can be regularly enforced by the course of the common law?—9th, Whether the said statute of 31 Car. 2, and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, extend to the case of any compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority, or to any case of imprisonment, detainer, or restraint whatsoever, except cases of commitment or detainer for criminal, or supposed criminal matters?—10th, Whether, in all cases whatsoever, the judges are so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them, although it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice?—The third question was waived at the request of the judges. Upon the first question they all delivered their opinions in the very same words, “that in cases not within the act of 31 Car. 2, writs of *habeas corpus ad subjiciendum*, by the law as it now stands, ought not to issue of course, but upon probable cause verified by affidavit.”—Mr. Justice Noel, upon the 2d and 4th questions, delivered his opinion, “That at the common law, before the statute 31 Car. 2, no judge could regularly issue a writ of *habeas corpus ad subjiciendum* in vacation; but, by the law as it now stands, upon the practice of the Court of King’s Bench ever since the said statute, such writs may issue in the vacation by a fiat from a judge of the Court of King’s Bench, returnable before himself, in cases not within the said act.”—Upon the 5th question, “That the judges at the common law, and before the said statute, were not bound to issue such writs of *habeas corpus ad subjiciendum* in vacation, upon the demand of any person under restraint; and might refuse to award such writ, if they thought proper, in the time of vacation.”—Upon the 6th question, “That the judges, at the common law, and before the said statute, were not bound to make such writs, so issued in vacation, returnable *immediate*; and they could not enforce obedience to such writ issued in the vacation, if the party served therewith should neglect or refuse to obey the same.”—Upon the 7th question, “That if a judge, before the said statute, should have refused to grant the said writ upon the demand of any person under any restraint, the subject had not any remedy at law, by action or otherwise, against the judge, for such refusal.”—Upon the 8th question, “That in case a writ of *habeas corpus* at the common law had been directed to any person returnable *immediate*, the court always granted an *alias* and *pluries habeas corpus* before due obedience could be enforced; but, since the statute 31 Car. 2, the *alias* and *pluries* have been omitted.”—Upon the 9th question, “That the statute 31 Car. 2, and the provisions therein made, for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority, nor to any cases of imprisonment, detainer, or restraint, except cases of commitment for criminal or supposed criminal matter.”—Upon the 10th question, “That the judges are not in all cases whatsoever so bound by the return to the writ of *habeas corpus*, that they cannot discharge the person brought before them, if it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice.”

Mr. Justice Wilmot, upon the 2d question, delivered his opinion, “That in cases not within the act 31 Car. 2, writs of *habeas corpus ad subjiciendum*, by the law as it now stands, may issue in the vacation by fiat from a judge of the Court of King’s Bench, returnable before himself.”—Upon the 4th question, “That after the Restoration, and before the statute 31 Car. 2, the chief justice and other judges of the Court of King’s Bench did, in fact, issue writs of *habeas corpus ad subjiciendum*, in the time of vacation, in criminal cases; and thinks such practice was legal, and warranted by the same principles which now support the practice of issuing writs in vacation in all cases which are not within the 31 Car. 2, but thinks there was no settled regular practice of issuing writs of *habeas corpus ad subjiciendum* in vacation, in any case before the statute 31 Car. 2, at the instance of a person under restraint.”—Upon the 5th question, “That the judges, at the common law, and before the said statute, were not, nor are now, bound to issue such writs of *habeas corpus* in time of vacation, upon the demand of any person under restraint; and, if they thought proper, might, and now may, refuse to issue such writs upon the demand of any person under restraint; for he thinks a copy of the commitment must be produced, or there must be some case made, before

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the judges are, or ever were, bound to grant such writs at the instance of a person under restraint."—Upon the 6th question, "That the judges, at the common law, and before the said statute, were not bound to make writs of *habeas corpus ad subjiciendum* issued in vacation-time returnable *immediatè*; and thinks the judges, in time of vacation, cannot enforce obedience to any writs of *habeas corpus* issued in time of vacation, whether they issue in cases within the 31 Car. 2, or in cases out of that act, if the party served therewith should neglect or refuse to obey the same by any means whatsoever."—Upon the 7th question, "That if a judge, before the said statute, should have refused to grant the said writ upon the demand of any person under restraint, the subject had no remedy at law, by action or otherwise, against the judge for such refusal."—Upon the 8th question, "That in case a writ of *habeas corpus ad subjiciendum* at the common law, and before the statute, had been directed to any person returnable *immediatè*, such person might have stood out an *alias* and *pluries habeas corpus*, before due obedience thereto could have been regularly enforced by the course of the common law: but the method of proceeding by *alias* and *pluries* in cases out of the act of 31 Car. 2, has been long gone into disuse; and in case a writ of *habeas corpus ad subjiciendum* at the common law be now directed to any person, returnable *immediatè*, he is of opinion, that the court would enforce obedience to such writ by attachment."—Upon the 9th question, "That the said statute of the 31st of King Charles 2, and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters."—Upon the 10th question, "That in no case whatsoever, the judges are so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them, if it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact; and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice; but by the clearest and most undoubted proof, he means the verdict of a jury, or judgment on demurrer, or otherwise, in an action for a false return: and, in case the facts averred in the return to a writ of *habeas corpus* are sufficient in point of law to justify the restraint, he is of opinion, that the court, or judge before whom such writ is returnable, cannot try the facts averred in such return by affidavits in any proceeding grafted upon the return to the writ of *habeas corpus*."—|| The answers of this learned judge are to be found at length, with his reasons, in his "Opinions and Judgments," p. 77.||

Mr. Justice Bathurst, upon the 2d and 4th questions, delivered his opinion, "That at common law, and before the 31 Car. 2, no judge could regularly issue a writ of *habeas corpus ad subjiciendum*, returnable before himself, in time of vacation, for the purpose of bailing or discharging; but by the law, as it now stands, such writ may issue in the vacation, by fiat from a judge of the Court of King's Bench."—Upon the 5th question, "That no judge at the common law, and before the said statute, was bound to issue such writ of *habeas corpus ad subjiciendum* in time of vacation, upon the demand of any person under restraint; and the judges might refuse to award such writ if they thought proper."—Upon the 6th question, "That the judges, by the common law, and before the statute, were not bound to make such writ, so issued in time of vacation, returnable *immediatè*; and they could not enforce obedience to such writ issued in time of vacation, if the party served therewith refused to obey the same."—Upon the 7th question, "That the subject had not any remedy, by law or otherwise, against a judge for what he did in his judicial capacity, before the statute 31 Car. 2."—Upon the 8th question, "That, at common law, the court always granted an *alias* and *pluries habeas corpus* before they enforced obedience by attachment or otherwise; but since the statute of the 31 Car. 2, the practice has been in that respect altered."—Upon the 9th question, "That the words of the statute 31 Car. 2, and of the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority, or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal or supposed criminal matter; but in favour of liberty, the judges of the Court of King's Bench have, in conformity to that statute, extended the same relief to all cases."—Upon the 10th question, "That the judges are not in all cases so bound by the return to the writ of *habeas corpus*, that they cannot discharge the person brought before them, in case it manifestly appears to them that such return is false, and that the person is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice."

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Mr. Baron Adams, upon the 2d question, delivered his opinion, "That, in cases not within the said act, by the law as it now stands, such writs may issue, in time of vacation, by fiat from a judge of the Court of King's Bench, returnable before himself."—Upon the 4th question, "That it appears to him, that at the common law, before the Restoration, the judges did not issue such writs of *habeas corpus* at the prayer of the subject in time of vacation, but that it began first to be put in practice about that time; yet he cannot say they could not have done it before, as the same authority which warranted their doing it then would have warranted it before, had it been thought necessary or expedient."—Upon the 5th question, "That the judges at the common law, and before the said statute, while no such practice was as yet settled and established by usage, were not bound to issue such writs of *habeas corpus* in time of vacation, but apprehends that the judges of the Court of King's Bench, upon a case properly laid before them, are bound at this day, the practice standing confirmed and established by so long an usage, to issue such writ in the vacation in cases not within the said statute."—Upon the 6th question, "That, as at the common law, and before the said statute, the judges were not bound to issue such writs of *habeas corpus* in the vacation, so they were not bound to make it returnable *immediatè*, nor had any means of enforcing obedience to it."—Upon the 7th question, "That if a judge, before the said statute, had refused to grant a writ of *habeas corpus*, the subject had no remedy against the judge for such refusal."—Upon the 8th question, "That in no case a single judge could do more than grant an *alias* or *pluries habeas corpus*; but as to writs issued by the court, the court have of late years adopted a practice of granting an attachment to enforce obedience to the first writ."—Upon the 9th question, "That the said statute of the 31st of King Charles 2, and the several provisions therein, do not extend to any cases of imprisonment or restraint whatsoever, except in cases of criminal or supposed criminal matter."—Upon the 10th question, "That if an action was brought for a false return made to a *habeas corpus*, and therein the return should be falsified by judgment upon verdict, demurrer, or otherwise, the judges might thereupon issue an *alias habeas corpus*, and upon that discharge the party; but that, in all cases whatsoever, when the matter comes before the court, singly upon the return made to the *habeas corpus*, if that return contains a sufficient and justifiable cause of restraint, the judges must determine upon the cause as it there appears, and cannot hear any proof in contradiction to it; but are so bound by the facts set forth therein, that though they be false in fact, and the party in truth restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice, they cannot discharge him, but he is driven to his action."

Mr. Baron Smythe, upon the 2d question, delivered his opinion, "That, in cases not within the said act, such writs of *habeas corpus*, by the law as it now stands, may issue in the vacation, by fiat from a judge of the Court of King's Bench, returnable before himself."—Upon the 4th question, "That, at the common law, and before the said statute of the 31st of King Charles the 2, the judges of the Court of King's Bench could issue such writs of *habeas corpus* in time of vacation, where a probable cause was shown that the person was unjustly imprisoned, or bailable."—Upon the 5th question, "That at the common law, and before the said statute, the judges of the Court of King's Bench were bound to issue such writs of *habeas corpus* in time of vacation, if a probable cause was shown, but not without."—Upon the 6th question, "That the judges at the common law, and before the said statute, were not bound to make such writs, so issued in time of vacation, returnable *immediatè*, but ought to make them returnable before themselves, or in court, as would best answer the purposes of justice. They could not, in vacation-time, enforce obedience to such writ; but, if the party served therewith should neglect or refuse to obey the same, the court of King's Bench, in the next term, could enforce obedience to such writ by attachment."—Upon the 7th question, "That a judge, before the said statute, for his refusal to grant a writ of *habeas corpus*, where he ought to have granted it, would have been liable to punishment in the same manner as for any other breach of his duty."—Upon the 8th question, "That, in case such writ of *habeas corpus*, at the common law, be directed to any person returnable *immediatè*, such person may stand out an *alias* and *pluries*, if the party suing out the writ chooses to sue out an *alias* and *pluries habeas corpus*; but the court will grant an attachment for the first disobedience, without putting the party to his *alias* and *pluries*."—Upon the 9th question, "That the said statute of the 31st of King Charles 2, and the several provisions therein, do not extend to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal, or supposed criminal matters."—Upon the 10th question, "That the judges were so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot enter into proof by affida-



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vits to controvert the return : the facts set forth in the return can be controverted or contradicted only by the verdict of a jury."

Mr. Baron Legge, upon the 2d question delivered his opinion, "That, in cases not within the said act, such writ of *habeas corpus*, by the law as it now stands, may issue in the vacation, by fiat from a judge of the Court of King's Bench, returnable before himself."—Upon the 4th question, "That, at the common law, and before the statute of *habeas corpus* in the 31st of King Charles 2, no judge could regularly issue a writ of *habeas corpus ad subjiciendum*, in time of vacation, in any case."—Upon the 5th question, "That the judges, at the common law, and before the said statute, were not bound to issue such writ of *habeas corpus ad subjiciendum*, in time of vacation, upon the demand of any person under restraint; but might refuse to award such writ, if they thought proper."—Upon the 6th question, "That the judges at the common law, and before the said statute, were not bound to make such writs, issued in time of vacation, returnable *immediate*, and could not enforce obedience to such writ issued in time of vacation, if the party served therewith should neglect or refuse to obey the same, by any means."—Upon the 7th question, "That if a judge, before the said statute, should have refused to grant the said writ upon the demand of any person under any restraint, the subject had not any remedy at law, by action or otherwise, against the judge for such refusal."—Upon the 8th question, "That in case a writ of *habeas corpus ad subjiciendum*, at the common law, had been directed to any person, returnable *immediate*, such person might have stood out an *alias* and *pluries habeas corpus*, before due obedience thereto could have been regularly enforced by the course of the common law; but, as the law now stands, the practice has long prevailed, for the Court of King's Bench to enforce the first *habeas corpus* by an attachment."—Upon the 9th question, "That the said statute of the 31st of King Charles 2, and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea-service, without any colour of legal authority; or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal, or supposed criminal matters."—Upon the 10th question, "That the judges are not, in all cases whatsoever, so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them, although it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact; and that the person so brought up is restrained of his liberty, by the most unwarrantable means, and in direct violation of law and justice."

Mr. Justice Clive, upon the 2d and 4th questions, delivered his opinion, "That, at the common law, and before the statute of 31 Car. 2, no judge could regularly issue a writ of *habeas corpus ad subjiciendum* in time of vacation; but, by the law as it now stands, such writs may issue in the vacation, by fiat from a judge of the Court of King's Bench, returnable before himself."—Upon the 5th question, "That no judge, by the common law, and before the said statute, was bound to issue such writ of *habeas corpus ad subjiciendum* in time of vacation, upon the demand of any person under restraint, and the judges might refuse to award such writ."—Upon the 6th question, "That the judges, by the common law, and before the said statute, were not bound to make such writ so issued in time of vacation, returnable *immediate*, and they could not enforce obedience to such writ issued in the time of vacation, if the party served therewith refused to obey the same."—Upon the 7th question, "That the subject had not any remedy, by law or otherwise, against a judge for what he did in his judicial capacity, before the said statute 31 Car. 2."—Upon the 8th question, "That at common law, the court always granted an *alias* and *pluries habeas corpus* before they enforced obedience by attachment."—Upon the 9th question, "That the words of the statute of the 31 Car. 2, and of the several provisions therein made, for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters."—Upon the 10th question, "That the judges are not in all cases so bound by the return to the writ of *habeas corpus*, that they cannot discharge the person brought before them, in case it manifestly appears to them that such return is false, and that the person is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice."

Mr. Justice Dennison, upon the 2d question, delivered his opinion, "That in cases not within the said act, such writs of *habeas corpus*, by the law as it now stands, may

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issue in the vacation by fiat from a judge of the Court of King's Bench, returnable before himself."—Upon the 4th question, "That before the statute of the 31st of King Charles 2, the judges of the Court of King's Bench, by usage, might issue a writ of *habeas corpus ad subjiciendum* in time of vacation."—Upon the 5th question, "That the judges of the Court of King's Bench might issue such writs in time of vacation, upon probable cause proved by affidavits; but the usage was not certainly established."—Upon the 6th question, "That the judges of the Court of King's Bench, before the said statute, might make such writs returnable either *immediatè*, or in the subsequent term; but could not enforce obedience to such writ issued in the vacation; but it might be done in the subsequent term."—Upon the 7th question, "That if a judge, before the statute, should have refused to grant the said writ upon demand, no action would lie against him."—Upon the 8th question, "That before the said statute, the party might stand out an *alias* and *pluries*; but, since the said statute, the course hath been to grant an attachment without any *alias* or *pluries*."—Upon the 9th question, "That the said statute of the 31st of King Charles 2, and the several provisions therein made, for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters."—Upon the 10th question, "That, in all cases whatsoever, where the return consists of facts justifying the taking and detaining by law, the judges are so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them upon affidavits to be read in that proceeding, contradicting the facts contained in the return; but, if it should appear most manifestly to the court, by the clearest and most undoubted proof, either in action or in some collateral proceeding, that such return is false in fact, and that the person so brought up is restrained of his liberty by unwarrantable means, and in direct violation of law and justice, the prisoner may be discharged."

Lord Chief Baron Parker, upon the second question, delivered his opinion, "That in cases not within the act of the 31st of King Charles 2, writs of *habeas corpus ad subjiciendum*, by the law as it now stands, may issue in vacation, by fiat from a judge of the Court of King's Bench, returnable before himself."—Upon the 4th question, "That before the statute of the 31st of King Charles 2, some of the judges of the King's Bench did, in fact, issue writs of *habeas corpus ad subjiciendum* in time of vacation; but it does not appear to his satisfaction, that there was any certain settled practice for issuing writs of *habeas corpus ad subjiciendum* in vacation, before the statute of the 31st of King Charles 2, upon the application of a person under restraint; but it has been shown that, in two instances before the said statute, the court disapproved of such practice; and he is therefore inclined to think, that the judges of the Court of King's Bench could not, before the said statute, regularly issue a writ of *habeas corpus ad subjiciendum*, for the purpose of discharging or bailing any person so under restraint as aforesaid, though he cannot positively say that they could not do so."—Upon the 5th question, "That the judges, at the common law, and before the said statute, were not bound to issue such writ of *habeas corpus ad subjiciendum* in time of vacation upon the demand of any person under restraint, but might refuse to award such writ, if a proper foundation was not laid for it by affidavit."—Upon the 6th question, "That the judges, at the common law, and before the said statute, were not bound to make writs of *habeas corpus ad subjiciendum*, issued in vacation, returnable *immediatè*; nor could they in time of vacation enforce obedience to such writ issued in time of vacation, if the party served therewith should neglect or refuse to obey the same, by any means whatsoever."—Upon the 7th question, "That if a judge, before the said statute, should have refused to grant the said writ, upon the demand of any person under any restraint, the subject had not any remedy at law, by action or otherwise, against the judge for such refusal."—Upon the 8th question, "That in case a writ of *habeas corpus ad subjiciendum*, at the common law, and before the said statute, had been directed to any person, returnable *immediatè*, such person might have stood out an *alias* and *pluries habeas corpus* before due obedience thereto could have been regularly enforced by the course of the common law; but the method of proceeding by *alias* and *pluries habeas corpus*, in cases out of the said statute, has been long discontinued; and, in case a writ of *habeas corpus ad subjiciendum*, at the common law, be now directed to any person returnable *immediatè*, he thinks that the court would enforce obedience to such writ by attachment."—Upon the 9th question, "That the said statute of the 31st of King Charles 2, and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his

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will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters.”—Upon the 10th question, “That in no case whatsoever the judges are so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them, if it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice; but, by the clearest and most undoubted proof he understands the verdict of a jury, or judgment on demurrer, or otherwise, in an action for a false return; and, in case the facts returned to a writ of *habeas corpus* show a sufficient ground in point of law for such restraint, he is of opinion, that the court, or judge, before whom such writ is returnable, cannot try the facts contained in such return by affidavits.”

Lord Chief Justice Willes, upon the second question, delivered his opinion, “That in cases not within the said act, such writs of *habeas corpus*, by the law as it now stands, may issue in the vacation, by fiat from a judge of the Court of King’s Bench, returnable before himself.”—Upon the 4th question, “That at the common law, and before the statute of the 31st of King Charles 2, none of the judges could regularly issue a *habeas corpus ad subjiciendum* in time of vacation, in any case whatsoever.”—Upon the 5th question, “That the judges, at the common law, and before the said statute, were not bound to issue such writs of *habeas corpus ad subjiciendum* in time of vacation, upon the demand of any person under restraint; but that they might refuse to award such writ, if they thought proper.”—Upon the 6th question, “That the judges, at the common law, before the said statute, were not bound to make such writs, so issued in time of vacation, returnable *immediatè*; and that they could not enforce obedience to such writs issued in time of vacation, if the party served therewith should neglect or refuse to obey the same, by any means whatsoever, before the next term.”—Upon the 7th question, “That if a judge, before the said statute, should have refused to grant the said writ upon the demand of any person under any restraint, the subject had not any remedy at law, by action or otherwise, against the judge for such refusal.”—Upon the 8th question, “That in case a *habeas corpus ad subjiciendum*, at the common law, had been directed to any person, returnable *immediatè*, such person might stand out an *alias* and *pluries habeas corpus* before due obedience thereto could be regularly enforced by the course of the common law.”—Upon the 9th question, “That the words of the statute of the 31st Car. 2, and the several provisions therein made for the immediate awarding and returning the writ of *habeas corpus*, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; nor to any cases of imprisonment, detainer, or restraint, except cases of commitment for criminal or supposed criminal matters.”—Upon the 10th question, “That the judges are not in all cases whatsoever so bound by the facts set forth in the return to the writ of *habeas corpus*, that they cannot discharge the person brought up before them though it should appear most manifestly to them, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice.”

Then it was proposed, “That the following question be put to the judges,” *videlicet*, “Whether, if a writ of *habeas corpus ad subjiciendum* at the common law be applied for, either in term or vacation time, by the friend or agent, and on the behalf, of any person, under actual confinement or restraint; and if the person so applying should make an affidavit of such confinement or restraint, and that he believes the same not to be by virtue of any commitment for criminal or supposed criminal matter, but should declare, that he could give no other material information relative thereto; would such an affidavit, as the law now stands, be a proper probable cause for the awarding of the said writ of *habeas corpus*? and would the court, or judge, be bound immediately to award the same as a writ of right? or would the court, or judge, be bound to refuse the same upon such affidavit only? or is it in such case entirely left to the discretion of the court, or judge, to grant the said writ of *habeas corpus* to one person upon such affidavit, and refuse it to another upon such affidavit, if they should so think fit?” And the same being objected to, after debate, the question was put, “Whether the said question shall be put to the judges?” It was resolved in the negative.]

¶ Though it was now seen that there was a material difference of opinion among the judges upon this great constitutional point; though the defects in the law were fully exposed, and the Lords, while they rejected the measure then before them, acknowledged the necessity of a further legislative enactment to supply those defects, by their

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direction to the judges to prepare a bill for that purpose; yet the effect of the discussion was short and transient. No notice was taken in the following session of the bill which the judges had prepared, nor was the subject in any, the slightest manner touched upon. All that had passed seemed to have at once sunk into oblivion; the law, as it stood, was acquiesced in, as fully adequate to the public security; Mr. Justice Blackstone, in considering the statute of the 31st of King Charles 2, in his Commentaries, published only a few years afterwards, asserts (book iii. c. 8) that "the remedy is now complete for removing the injury of unjust and illegal confinement;" Ireland, upon her separation from this country in 1781, took the statute as she found it, and entered it in her statute-book with all its imperfections; and when the act lately passed, in the 56th of the king, was first introduced into the House of Lords, it was opposed by the then chief justice of the King's Bench, as a measure wholly unnecessary. One knows not indeed how to reconcile with the high spirit of the people of this country, and their ardent love of liberty, the difficulty and repugnance which their legislature have felt in the passing of bills calculated to give further effect to, and to extend the benefits of the writ of *habeas corpus*. The statute of the 31st of King Charles 2, if we may credit Burnet, was carried by a mere trick, with an actual majority against it. I give the account in the very words of the historian. "The act," meaning the act of Charles, "was passed," he says, "by an odd artifice in the House of Lords. Lord Grey and Lord Norris were named to be the tellers. Lord Norris, being a man subject to vapours, was not at all times attentive to what he was doing; so a very fat lord coming in, Lord Grey counted him for ten, as a jest at first; but seeing Lord Norris had not observed it, he went on with the misreckoning of ten. So it was reported to the House, and declared that they who were for the bill were the majority, though it, indeed, went on the other side; and by this means the bill passed." *Own Times*, vol. i. p. 273. Though we may not give implicit credit to this story, we collect this from it, that the division must have been very near, else such a story could not have obtained a circulation. When the late act of 56 G. 3, was first brought under the consideration of parliament, it was rejected. It passed, as the act of Charles had done, through the Lower House without difficulty; but it met with so strong an opposition in the other House, particularly from the two great law lords, the chancellor and the chief justice of the King's Bench, the one declaring it to be unnecessary, and the other objecting to it as savouring of the innovating spirit of the times, and likely to be injurious to the naval service, that it was lost upon the second reading. The bill would probably have been no more heard of, but for the spirit and perseverance of the gentleman by whom it had been brought in, Mr. Serjeant Onslow, who, immediately upon its rejection by the Lords, moved the Commons for a select committee to investigate the subject. His motion was instantly complied with, and the committee thereupon appointed reported the existing laws to be inadequate to the public security. His ground being thus strengthened, the learned serjeant, in the following session, introduced the bill again, when, as before, it passed speedily through the Commons; but, though there appeared to be no direct opposition to it in the other House, and the chief justice of the King's Bench had become friendly to it; yet it was found necessary, in order to facilitate its progress, and to secure its passage before the close of the session, which was far advanced, to withdraw the great seal from its provisions, and to confine the powers granted by it to the judges of the courts of common law. Thus altered, it passed into a law without further objection.

The bill in its original shape, as introduced by the learned serjeant, was nearly, if not entirely, the same with that prepared by the judges in 1758. The act differs from it in the substitution of a power to arrest and hold to bail by the warrant of a judge, instead of the granting of an attachment by a judge in case of disobedience; in the omission of powers to grant issues and award costs; in making no mention of the great seal; and in its extension to Ireland. It is not an unimportant circumstance to notice, that this last alteration was made at the express instance of Mr. Croker, the then secretary to the Admiralty, upon the first introduction of the bill into the House of Commons in 1814.

There is a statute in Scotland against wrongous imprisonment, and undue delays in trials, which is considered to be as valuable for the protection of the liberty of the subject in that country, as the *habeas corpus* acts are in England. It was declared by the claim of rights, that the imprisonment of persons without expressing the reasons thereof, and delaying to put them to trial, is contrary to law; but, notwithstanding this declaration, this abuse of power had never been properly restrained. An act had been frequently demanded, but none was passed till the 31st of January, 1701. By that statute, the informer is required to subscribe his information; the magistrate to sign a

(C) Of the *Habeas Corpus ad faciendum*, &c.

warrant expressive of the particular cause of commitment; and, upon application to a competent judge, the prisoner is ordered to be released upon bail, within twenty-four hours, unless the offence be capital, in which case his trial is to be brought on within sixty days. When released on the failure to prosecute, he may be imprisoned again on a second indictment: but, if twice discharged, he is exempt from all further prosecution for the same offence. Arbitrary transportation, so frequent during the former reigns, is prohibited without a legal sentence, or judicial consent; and in addition to the severe penalties annexed to wrongful imprisonment, or wrongful transportation, the judges who reject the prisoner's application, or refuse to give full effect to the act, are declared incapable of public trust. If inferior, in some particulars, to the *habeas corpus* act in England, says Mr. Laing, the act inflicts a more adequate penalty on the iniquity of the judge. But for the regard shown to this statute in the Scottish courts, see the case of *Andrew v. Murdoch*, 2 Dow's P. C. 401.||

(C) Of the *Habeas Corpus ad faciendum et recipiendum*.

THE *habeas corpus ad faciendum et recipiendum* is used only in civil causes, and lies for removing suits out of an inferior to some superior court, at the application of the defendant, who may imagine himself injured by the proceedings of such inferior court.

Mod. 235; 2 Mod. 198. {An assize of nuisance or other real action cannot be removed by it. 1 Bin. 251, *Livezey v. Gorgas*.}

[This writ is commonly called a *habeas corpus cum causâ*, and is grantable at all times of common right, whether in term or vacation, without motion in court.

1 Lev. 1; 2 Mod. 306. β A writ of *habeas corpus cum causâ* must be shown to the court in which the suit is pending, or delivered to the sheriff in whose custody the defendant is, otherwise there can be no removal. *Fleming v. Bradley*, 1 Call. 203.g

By the statute of 43 Eliz. c. 5, it is enacted, "That no writ or writs of *habeas corpus*, or any other writ or writs sued forth, or to be sued forth, by any person or persons whatsoever, out of any of her majesty's courts of record at Westminster, to remove any action, suit, plaint, or cause, depending or to be depending in any court or courts within any city or town corporate, or elsewhere, which have or shall have jurisdiction, power, or authority to hold plea in any action, plaint, or suit, shall be received or allowed by the judge or judges, officer or officers, of the court or courts wherein or to whom any such writ or writs shall be delivered (but that he and they shall and may proceed in the said cause and causes ready to be tried, as though no such writ or writs were sued forth or delivered to him or them,) except that the said writ or writs be delivered to the judge or judges, officer or officers of the said court, before that the jury which is to try the cause in question between the party or parties plaintiffs, and the party or parties that sued forth the said writ or writs, or for whose benefit the said writ or writs is or shall be sued forth, have appeared, and one of the said jury sworn to try the said cause."

And by 21 Jac. 1, c. 23, § 2, "No writ or writs of *habeas corpus*, *certiorari*, or any other writ or writs, process or processes, other than writs of error, or attaint to be sued forth by any person or persons whatsoever, out of or from any of his majesty's courts of record at Westminster, or the court of the great sessions in Wales, or out of any other court or courts, having, or pretending to have power to award such writs or processes, to stay or remove any action, bill, plaint, suit, or cause brought, commenced, or depending, or hereafter to be brought, commenced, or depending in any court or courts of record within any city, liberty, town corporate, or elsewhere, which have or shall have jurisdiction, power, or

(C) Of the *Habeas Corpus ad faciendum*, &c.

authority to hold plea in that action, bill, plaint, suit, or cause; the same cause of action, bill, plaint, or suit, arising or growing within the said city, liberty, town corporate, or jurisdiction; shall be received or allowed by the steward or stewards, judge or judges, or officer or officers of the court or courts wherein or to whom any such writ or writs shall be directed and delivered; but that he and they shall and may proceed in the said cause or causes as though no such writ or writs were issued forth or delivered to him or them; except that the said writ or writs be delivered to the steward or stewards, judge or judges, officer or officers of the said court, before issue or demurrer joined in the said cause or causes so depending or to be depending in any such court of record in any city, liberty, town corporate, or elsewhere, having power to hold such plea, so as the said issue or demurrer be not joined within six weeks next after the arrest or appearance of the defendant or defendants to such action or suit commenced."

This last statute, it hath been holden, is confined to inferior courts of record; and doth not extend to the case of an interlocutory judgment; and the practice in that case is to allow the *habeas corpus* as upon the 43 Eliz., provided it be delivered at any time before the jury are sworn; which practice also obtains where issue is joined within six weeks next after the defendant's arrest or appearance.

Cox v. Hart, 2 Burr. 758; Bevan v. Protheske, Ibid. 1151. But *contra*, Wyatt v. Markham, Barnes, 221; Hornbuckle v. Eaton, Ibid.

By § 3, of 21 Ja. c. 23, If any cause commenced in any such inferior court be removed by any writ or process, and afterwards remanded by *procedendo* or other writ, such cause shall never afterwards be removed or stayed before judgment by any writ out of any court whatsoever. By § 4, If in any cause not concerning freehold or inheritance, or title of land, lease, or rent, commenced or depending in any such inferior court of record, it shall appear to be laid in the declaration, that the debt, damages, or things demanded do not amount to five pounds, such cause shall not be stayed or removed by any writ or writs whatsoever, other than writs of error or attain.

But soon after the passing of this statute a method of evading it was devised, by setting up another action for a fictitious demand of 5*l.* or upwards, and then upon the *habeas corpus* both causes were removed. In order to prevent this, it was enacted by 12 Geo. c. 29, § 3, that the judges of such inferior courts as are described in the statute of James shall and may proceed in such causes as are therein specified, which appear or are laid not to exceed the sum of five pounds, although there may be other actions against the defendant, wherein the plaintiff's demands shall or may exceed the sum of five pounds. And by the statute of 19 Geo. 3, c. 70, § 6, no cause where the cause of action shall not amount to ten pounds or upwards shall be removed or removable into any superior court, by any writ of *habeas corpus* or otherwise, unless the defendant, who shall be desirous of removing such cause, shall enter into a recognisance to the plaintiff in the inferior court, with two sufficient securities in double the sum demanded, for the payment of the debt and costs, in case judgment shall pass against him.

Armington's case, Palm. 403.

By a proviso in § 6, of the statute of James, that act is limited to such "courts of record in cities, liberties, towns corporate, or elsewhere, and for so long a time only as there is or shall be an utter barrister of three

(C) Of the *Habeas Corpus ad faciendum*, &c.

years' standing at the bar of one of the four inns of court, that is or shall be steward, under-steward, or deputy-steward, town-clerk, or judge, or recorder of the same inferior court, or that is or shall be from time to time assistant to such judge or judges of such inferior court, as shall not be utter barristers of such standing, as is aforesaid there present, in which such actions, bills, complaints, suits, or causes are or shall be brought, commenced, or depending; and not of counsel in any action or suit then depending in the same inferior court."

If this proviso be not complied with, the cause may be removed at any time: and it is not enough that the judge is a barrister; he must be actually present at the trial.

Clapham's case, Cro. Ca. 79; Anon. 3 Mod. 89; Fairley v. McConnel, 1 Burr. 514.

But, if the writ be disallowed by the judge of the inferior court for any of the causes above specified, it must be returned to the court above with the *special matter*.

Watson v. Clerke, Carth. 69; Haley's case, 1 Mod. 195.]

The writ suspends the power of the court below; so that if they proceed after, the proceedings are (a) void, and *coram non judice*.

Salk. 352. (a) After a writ of *habeas corpus* served, it is error to proceed. Cro. Car. 261; Ellis v. Johnson, 2 Jon. 209, S. P. adjudged. If a *habeas corpus* be directed to an inferior court, returnable two days after the end of the term, yet the inferior court cannot proceed contrary to it. Mod. 195; 12 Mod. 666.

By this writ the proceedings in the inferior court are at an end; for the person of the defendant being removed to the superior court, they have lost their jurisdiction over him, and all the proceedings in the superior court are *de novo*, and (b) bail *de novo* must be put in the superior court.

Skin. 244, pl. 9. [But this writ doth not remove the record; the return is merely a history or account of the proceedings below sent up to the superior court, to enable them to judge and determine the matter there. Ibid. 1 Salk. 352; 6 Mod. 177; 1 T. R. 372.] (b) Though the sum be under 10*l.*, yet if in the inferior court special bail was requisite, there shall be special bail in the court above.

And although this writ be a writ of right, yet where it is to abate a rightful suit, the court may refuse it; as, where an action of debt was brought against a feme sole in the palace court, who after appearance and plea pleaded, married, and then removed the cause by *habeas corpus* to B. R., where she pleaded her coverture in abatement; the court held, that if this matter had been moved on the return of the *habeas corpus*, they would have granted a *procedendo*; but that now the plea in abatement must be holden good; for the proceedings are *de novo*, and the court takes not notice of the proceedings below, or of what preceded the *habeas corpus*.

Salk. 8, Hetherington v. Reynolds.

After an interlocutory, and before final judgment in an inferior court, a *habeas corpus cum causâ* was brought. Before the return of the writ the defendant died, and a *procedendo* was awarded, because by the 8 & 9 W. 3, c. 11, the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which would be unreasonable.

Salk. 352.

If an action be brought in London for calling a woman a whore, this cannot be removed by *habeas corpus*, because the words are not actionable elsewhere; and if allowed to be removed, the custom would be destroyed.

2 Roll. Abr. 69; Carth. 75.

(C) Of the *Habeas Corpus ad faciendum*, &c.

[So where a *feme covert*, sole trader in London, is sued in either of the city courts.

Pope v. Vaux, 2 Bl. Rep. 1060.

Where an action was brought in the court of the sheriffs of London against two partners, and one of them brought a *habeas corpus*, and put in bail for himself only, a *procedendo* was granted; for otherwise the plaintiff would have been disabled to go on in either court.

Fry v. Cary, 1 Str. 527.]

|| But the plaintiff in an inferior court, from which a cause is removed by *habeas corpus*, is not entitled to a *procedendo* after render of the defendant and notice of such render; although the render be made after the day on which the rule for better bail expires.

Farquharson v. Fouchecour, 16 East, 387.||

[If a prisoner, who is brought up from a county jail, to be turned over to the King's Bench, will not pay the sheriff the charges for bringing him up, the court will remand him.

Anon. 1 Str. 308.

If one shilling *per mile* is tendered and refused, an attachment shall be granted.

Nicholas Fling's case, Barnes, 377.

But the jailer must obey the *habeas corpus*, though the prisoner refuse to pay his fees, for he has his remedy for them.

Holman v. Barber, Str. 814. See Crompton v. Ward, Ibid. 433, the opinion of Fortescue, J., *contr.*

If the plaintiff deliver to the sheriff a *habeas corpus* to remove the defendant in execution on a *ca. sa.* to the King's Bench prison, the sheriff cannot refuse to obey till his poundage is paid. *Semb. Sed qu.* For it was argued in this case, that he should carry him to a judge's chambers; and Foster, J., said, if he came before him, he would not turn him over till poundage paid.

White v. Heigh, Str. 1262.

If it is tested in term, it may be returnable *immediatè* before the chief justice.

Bettesworth v. Bell, 3 Burr. 1875.

The plaintiff may remove the defendant by this writ, after he has declared against him in custody of the sheriff.

Bettesworth v. Bell, 3 Burr. 1875.

The defendant may be committed, though the return-day is past.

Hewitt v. Powell, Barnes, 221.

A prisoner in the Fleet by process of C. B. may be brought up by rule; but, if holden by execution of another court, there must be a *habeas corpus*.

Barnes, 385.]

|| This writ lies for the bail of the defendant to bring him up, and surrender him in their discharge, to the custody of the marshal of the King's Bench, or warden of the Fleet prison; and that, whether the defendant be in custody in a civil suit, or on a criminal account. (a) In civil cases the courts generally commit him to the custody of the marshal or warden; but, where he is in custody on a criminal account, they remand him to his former custody. (b) Where an impressed man, not being liable to be taken out of the king's



## Heir and Ancestor.

service by any process, other than some criminal matter, was brought up by the keeper of the Savoy to be surrendered in discharge of his bail, (c) the Court of King's Bench first committed him to the custody of the marshal, and then ordered him to be delivered *instantly* to the keeper of the Savoy; which was done, and an *exoneretur* entered on the bail-peace. The *habeas corpus*, in such case, is issued on the crown side of the Court of King's Bench; (d) on which side also must be taken out the subsequent rule for his surrender in the action, his commitment *pro forma* to the marshal, and his recommitment to his former custody, charged with the several matters against him. And as the Court of Common Pleas (e) cannot in such case change the custody, they will not grant a *habeas corpus* to bring up a prisoner in custody on a criminal account, in order to have him charged with a declaration in a civil action.

Tidd's Pr. 342. (a) Sharp v. Sheriff, 7 T. R. 226; Daniel v. Thompson, 15 East, 78. (b) Vergen's Bail, 2 Str. 1217; but see Fowler v. Dunn, 4 Burr. 2034. (c) Bond v. Isaac, 1 Burr. 339. (d) Taylor's case, 3 East, 232. (e) Walsh v. Davies, 2 N. R. 245. *Ex parte* Martin, Barnes, 223.

Where the crown is concerned, the courts will not, in general, change the custody without the express consent of its officers.

Coates's case, Barnes, 385; Sandys v. Spivey, Ibid. 388; Hodgson v. Temple, 5 Taunt. 503; 1 Marsh. 166, S. C.; R. v. Pedley, Tr. 23 G. 3, K. B. 1 Tidd's Pr. 343.

As to what shall be evidence of a commitment on a *habeas corpus*, vide *supra*, tit. *Escape*, &c.; (G) vol. iii. p. 417; to which add the case of Cooper v. Jones, 2 M. & S. 202, where the Court of King's Bench refused to compel the marshal to affile of record a writ of *habeas corpus cum causâ*, by virtue of which a person is committed to his custody in execution.

Sturges v. Brown, 2 Mer. 511; Prendergast v. Saubergue, Ibid. n.

A defendant to a bill in Chancery may be removed by this writ from the King's Bench to the Fleet prison, for contempt in not putting in his answer; and if he afterwards procures himself, by another writ, to be recommitted to the King's Bench prison, in order to prevent his being brought up on an *alias pluries habeas corpus*, the chancellor will order the bill to be taken *pro confessio* against him, in default of his putting in his answer by the time an *alias pluries* might issue against him.

Merefield v. Hulls, Barnes, 20.

If this writ be returnable before the chief justice, the commitment may be by another judge, without amending the return. It is warranted by the practice, and is similar to the *habeas corpus* act of 31 Car. 2.||

## HEIR AND ANCESTOR.

(A) Of the Nature of the Relationship between Heir and Ancestor.

(B) Of the several Kinds of Heirs: And herein,

1. *Of the Heir Apparent.*
2. *Of the Heir General, or Heir at Common Law.*
3. *Of the Special Heir, or Issue in Tail.*
4. *Of the Customary Heir.*
5. *Of the Hæres Factus.*

## (B) Of the several Kinds of Heirs.

(C) Of what Conditions, Covenants, &c., of the Ancestor, the Heir shall take Advantage.

(D) What Conditions, Covenants, &c., shall extend to him so as to bind him.

(E) What Actions he may commence and prosecute in Right of his Ancestor.

(F) Where the Heir shall be said to be bound to answer his Ancestor's Debts and Contracts.

(G) How to be proceeded against where he is bound.

(H) Where he shall be liable himself, and the Judgment general or special: And herein,

1. *Where he shall be liable for his false Pleading.*

2. *Where by his Promise to pay or discharge the Debt of his Ancestor.*

(I) What shall be Assets in his Hands.

*What Things shall go to the Heir, and not to the Executor, vide tit. Executors and Administrators.*

## (A) Of the Nature of the Relationship between Heir and Ancestor.

AN heir, saith my Lord Coke, in the understanding of (a) the common law, is he to whom lands, tenements, or hereditaments, by the act of God and right of (b) blood do descend, of some estate of (c) inheritance.

Co. Lit. 7 b; 3 Co. 12 b. (a) But by the civil law *haeres ex testamento succedit in universum jus testatoris*; so that by taking the whole estate, whether it be real or personal, by the will he is made heir, and called only by that name. Godolph. Orph. Leg. 119.  $\beta$  A considerable difference exists in the meaning of the term heir as understood by the common lawyers and by the civilians. By the latter the term is applied to all persons who are called to the succession, whether by the act of the party or the operation of law. The person who was created universal successor by a will was called testamentary heir; and the next of kin by blood was, in cases of intestacy, called the heir at law, or heir by intestacy. The executor of the common law is, in many respects, not dissimilar to the heir of the common law. Again, the administrator corresponds in many points to the heir by intestacy. 1 Brown's Civ. Law, 344; Story, Confl. of Law, § 508; Bouv. L. D. h. v. g (b) And therefore heir and ancestor are always applied to natural persons, as predecessor and successor are to bodies politic and corporate. Co. Lit. 78 b. (c) For a man cannot be heir to goods or chattels; for *haeres dicitur ab hereditate*, Co. Lit. 8 a, *vel dicitur ab haerendo, quia hereditas sibi haeret*. Co. Lit. 7 b

The word *heir* in the notion of it implies, that the party hath all those legal (d) qualifications which our laws require in all persons that represent or stand in the place of another, and is of such importance, that regularly without the word *heir* no fee-simple can be created.

(d) Co. Lit. 9. But there are exceptions to the general rule. For these, and that an heir at law is to be favoured, vide tit. *Descent*, and vide tit. *Estate in Fee-simple*, and tit. *Devise*, and *infra*.

## (B) Of the several Kinds of Heirs: And herein,

I. *Of the Heir Apparent.*

HERE we must observe, that no person can be heir until the death of his ancestor, according to the rule *nemo est haeres viventis*; (e) yet in common parlance he who stands nearest in degree of kindred to the ancestor is called, even in his lifetime, heir apparent. (g)

Co. Lit. 8 a.  $\beta$  *Cruger v. Hayward*, 2 Desaus. 94. g (e) [There is an exception to this rule in the case of the Duchy of Cornwall, which the king's eldest son takes by hereditary right in the lifetime of his father under the 11 Ed. 3; for without an act of parliament the course of descent could not be altered. 8 Co. 16; 1 Ves. 294. (a) He is not called heir apparent, unless his right of inheritance be indefeasible, provided he

## (B) Of the several Kinds of Heirs.

outlive the ancestor; if he be only heir in the present circumstances of things, subject to have his right defeated by the contingency of some nearer heir being born, he is called only presumptive heir. 2 Bl. Comm. 208; Co. Lit. 35 b.]

Also, the law takes notice of an heir apparent so far as to allow the father to bring an action of trespass for taking away his son and heir, *quare filium et heredem rapuit*, the father being guardian by nature to his son where any lands descended to him.

3 Co. 37; Rateliff's case, Co. Lit. 75, 84; Dyer, 189; Vaugh. 180.

Also, a person may take by purchase, or *descriptio personæ*, by the name of heir even in the lifetime of his ancestor; as, where a man devised lands to A and his heirs during the life of B in trust for B, and after the decease of B to the heirs male of the body of B now living; it was held that by this devise the remainder was immediately vested in the son, and that the words *heirs male now living* in a will were a full description of the son, who then was the heir apparent of B, and known by the devisor to be so.

Vent. 311, 334; Raym. 330; 2 Lev. 232, Burchet and Durdant. But for this vide tit. *Devise*, letter (L).

But the son and heir hath no power over the inheritance during the life of the ancestor: Therefore if a son and heir bargains and sells the inheritance of his father, this is void, because he hath no right to transfer. So, if he (*a*) releases, the law is the same.

Kelw. 84; Co. Lit. 265. || The expectancy of an heir presumptive or apparent (the fee-simple being in the ancestor) is not an interest, nor a possibility, nor is it capable of being made the subject of assignment or contract. The cases of Beckley v. Newland, 2 P. Wms. 182, and Hobson v. Trevor, Ibid. 191, which seem to oppugn this position, are cases of covenant to settle or assign property which should fall to the covenantor; where the interest which passed by the covenant was not an interest in the land, but a right under the contract. See also Wright v. Wright, 1 Ves. 326. An estate, therefore, descending to a bankrupt after the bargain and sale of the commissioners, and before the certificate, does not vest in the assignees without a subsequent assignment, but is the property of the bankrupt. Carleton v. Leighton, 3 Mer. 667; Moth v. Frome, Ambl. 394; Jones v. Roe, 3 T. R. 88. || (*a*) But it seems that if the son releases with warranty, he and his heirs are for ever barred by the rebutter. Co. Lit. 265 a. || So, if the heir levy a fine of lands in the lifetime of his ancestor, it will bind by estoppel after descent to him. Per Lord Hardwicke, 1 Ves. 412, 391. ||

But, if the son makes a feoffment of the inheritance of his father, this passes an estate during the son's life; for it is a disseisin to the father, and the son after the father's death cannot avoid it; for no man can allege an injury in a voluntary act of his own.

Co. Lit. 265 a.

Neither is there that privity between the heir apparent in blood only, and not of the land, and his ancestor, as to make a fine of such land levied by the ancestor, a bar within the 4 H. 7, c. 24; as, if the heir apparent be seised of lands, and the father levy a fine and die, it shall not bar the heir; because he does not claim or derive any title to the land from his father, and therefore in that respect shall have five years to preserve himself from the fine; for the privies understood and intended by the act are those who are privy not only in blood, but likewise in estate and title to the land of which the fine was levied, that is, those who must necessarily mention the conusor, and convey themselves through him, before they can make out their title to the estate.

2 Inst. 523; 3 Co. 89 a; Hob. 333.

(B) Of the several Kinds of Heirs.

## 2. Of the Heir General, or Heir at Common Law.

The heir at common law is he who after his father's or ancestor's death has a right to, and is introduced into all his lands, tenements, and hereditaments.

He must be of the whole blood, not a bastard, alien, &c., vide tit. *Descents*, and tit. *Coparceners*.

None but the heir general, according to the course of the common law, can be heir to a warranty, or sue an appeal of the death of his ancestor.

Co. Lit. 14 a; Cro. Ja. 217, 218. Vide tit. *Appeal*, letter (C).

If a condition be annexed to borough-english or gavelkind lands, and the condition be broken, the heir at common law shall enter; for the condition is a thing of new creation, and collateral to the land: But, when the eldest son enters, the heir or heirs by custom shall enjoy the land; for by breach of the condition they are restored to their ancient estate.

Cro. Eliz. 204; Plow. 28; Co. Lit. 11, 12. [Vide *supra*, 495.]

If a man seised of fee-simple lands, as also of lands of the nature of gavelkind and borough-english, acknowledge a statute, and die, the heir at law shall make the special or customary heirs contribute in proportion, because all of them come in as heirs to the land descended, and are equally chargeable with the debts of the ancestor.

Hob. 25; Co. Lit. 376.

So, if A binds himself in a recognisance or statute, and after his death some of his lands descend to the heir of the part of the father, and some to the heir of the mother, both heirs shall be equally charged; and if the donee loads one only, he shall have contribution.

3 Co. 13 a; 2 Co. 25 b.

The heir at law is bound by his ancestor's (a) alienations and dispositions, as also by his covenants and conditions, as far as he hath assets.

(a) But, if a man covenants that after his death his heir at law shall stand seised to the use of his youngest son, this is void. Hob. 313, *per* Hobart.

Also, if the ancestor agrees to convey or sell lands, and receives part of the purchase-money, but dies before a conveyance is executed, || or even before the time agreed upon for completing the contract, (b) || and a bill is brought against the heir, he will be decreed to convey, and the money shall go to the executor, especially if there are more debts due than the testator's personal estate is sufficient to pay.

Baden v. Countess of Pembroke, 2 Vern. 215; Abr. Eq. 265; Gilb. Lex Prætor. 243. (b) Winged v. Lefebury, 2 Eq. Ca. Abr. 32, pl. 43.

So, if a father conveys to a younger son by a defective conveyance, and dies, the heir at law in two cases shall be compelled to make it good.

1. Where there is a covenant for further assurance, binding the heir.
2. Where there is a provision made by the father in his lifetime for the heir, or he hath such provision by descent from the father.

Gilb. For. Rom. 221.

Also, the heir at law is bound by a decree obtained against the ancestor; which may be carried into execution two ways. 1st. If the decree is enrolled, the party may sue out a *subpœna scire facias* against the heir, to show cause against the decree: But this is only after an enrolment, and not before: And the party must, at the return of the *subpœna*, show cause, if he have any, against the decree.

[1 Ves. 184. The enrolment of decrees being now much disused, it is become the practice to revive in all cases, indiscriminately, by bill. Mitf. Eq. Pl. 65.]

## (B) Of the several Kinds of Heirs.

2dly. The plaintiff may bring his bill of revivor, to carry the decree into execution: And this is the surest and safest way; for where the decree was obtained against the ancestor, and his heir does not claim under that title, but by virtue of another title paramount, there the decree can never be carried into execution against him; as, where an estate is decreed against a man, and his heir insists his father had no title thereto, or was only tenant for life thereof, the decree in that case can never be carried into execution against him; he is at liberty to controvert the justice and validity of that decree; he may make a new defence from what his ancestor did, and vary his case as he shall be advised, and the parties go into a new examination of the matter, and hear the cause *de novo*, and the court judge whether the decree is right or not, and may affirm or reverse it at their pleasure.

But, where one man obtains a decree against another for a real estate, and the party dies before the plaintiff is put into possession, in that case if the heir at law claims the estate by descent under his ancestor, or as devisee under him, he shall never controvert the justice of the decree, though his ancestor should have mistaken his defence; nor shall he be at liberty to make a new defence, or enter into new proof, so as to overthrow the former decree, especially where it appears to the court that the decree hath been of an ancient standing.

## 3. Of the special Heir, or Issue in Tail.

The issue in tail claims *per (a) formam doni*, and as the statute *de donis* preserves the estate to him, his ancestor cannot grant or alien, nor make any (b) rightful estate of freehold to another, but for term of his own life.

Lit. § 613. (a) And therefore the rule of *possessio fratris* does not extend to lands in tail; for as to them a man must claim as heir *per formam doni*. Co. Lit. 15, vide tit. *Descents*, letter (C). (b) How far he may discontinue, vide tit. *Discontinuance*, letter (B). That by the 32 H. 8, c. 28, he may make leases for three lives, or 21 years, to bind his issue, but not those in reversion or remainder, vide tit. *Leases and Terms for Years*.

If the issue in tail be attainted of felony in the life of his father, and pardoned, upon the death of the donee, the donor cannot enter; for though the disability to take by descent remains after the pardon, yet the donor cannot enter against his own gift while there is any issue in being; and though the issue cannot, by reason of such disability, claim as heir to the donee, yet he may enter as a special occupant, for the gift is still a good *designatio personæ*, who shall take upon the death of the donee; but then the issue must take it subject to the charges of his father, because he is to take it as the tenant left it, and consequently, is to make good all charges which he left upon it.

Plowd. 557; 8 Co. 166 a.

## 4. Of the Customary Heir.

A custom in particular places varying the rules of descent at common law is good; such as the custom of gavelkind, by which all the sons shall inherit, and make but one heir to their ancestors: the general custom of gavelkind lands extends to sons only; but a special custom, that if one brother dies without issue, all his brothers may inherit, is good.

Vide tit. *Descent*, letter (D), tit. *Borough-English and Gavelkind*. Co. Lit. 140 a.

But, if a remainder of lands of the nature of gavelkind be limited to

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the right heirs of J S, the heir at common law shall take it, and not the heirs in gavelkind; for this remainder being newly created, cannot be reckoned within the custom.

Co. Lit. 10; Hob. 31.

So, the custom of borough-english, that the youngest son only shall inherit, is good. But the youngest brother shall not inherit, by force of this custom, unless there shall be a particular custom to that purpose also.

Co. Lit. 110; 2 Lev. 138; Cro. Car. 411; Sir W. Jon. 361.

#### 5. Of the *Hæres factus*.

An *hæres factus* is only a devisee of lands, being made so by the will of the testator, and has no other right or interest than the will gives him.

3 Co. 42 a.

It has been holden in Chancery, that such an heir shall have the aid of the personal estate in discharging the debts of the testator.

Pockley v. Pockley, Vern. 36.

But this must be understood of an *hæres factus* of the whole estate, for a devisee (*a*) of particular lands shall not have the benefit of the personal estate.

Gower v. Mead, Pr. Ch. 3. (*a*) [But such a devisee shall have this benefit. So ruled by Lord Nottingham in the above case of Pockley v. Pockley, and now admitted as settled law. Galton v. Hancock, 2 Atk. 437; Lutkins v. Leigh, Ca. temp. Talb. 53.]

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Conditions (*b*) and covenants real, or such as are (*c*) annexed to estates, shall descend to the heir, and he alone shall take advantage of them.

43 E. 3, 4; And. 55. (*b*) Conditions can only be reserved to the feoffor, donor, or lessor, and their heirs, but not to any stranger. Lit. § 447; Co. Lit. 214. (*c*) *Secus* of covenants in gross. Palm. 558.—Also, for a breach in the time of the covenant, the action shall be brought by his executor, though the covenant was with him, his heirs and assigns only. Vent. 175; 2 Lev. 26, adjudged. *β* An heir is entitled to land to which his ancestor had an equitable right, and if the purchase-money remains unpaid, he may pay it, or he may insist on its being paid by the personal representative so far as he has available assets. Brewer v. Vanarsdale's heirs, 6 Dana, 204; Champion v. Brown, 6 Johns. Ch. 402.*g*

*β* When the land has been sold by an executory contract, and the legal title has passed to the vendor's heir, who as such is entitled to the purchase-money through the executor of his ancestor, and the heir dies, the title passes to his heirs, and the right to the unpaid purchase-money to his representatives.

Murdrow v. Murdrow, 2 Dana, 386.

The intestate contracted with a carpenter to build him a house for £800, and advanced £500, but died before the work began. His administrators afterwards rescinded the agreement, taking back the money. The heir at law was decreed to have the benefit of the contract, and have the money raised out of the personal estate, together with the interest for two years from the death of the intestate.

Haliburton v. Kershaw, 3 Desaus. 105.*g*

And this not only where there are express words, but also where there are none; for the law, by implication, reserves the condition to the heir of the feoffor, &c.; for being prejudiced by the disposition, it is but reasonable

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that he should take the same advantages which his ancestor whom he represents might.

Roll. Abr. 470, 472.

If a man seised of land in right of his wife makes a feoffment in fee upon condition, and dies, and after the condition is broken the heir of the husband shall enter; for though no right descended to him, yet the title of entry by force of the condition, which was created upon the feoffment, and reserved to the feoffor and his heirs, descended.

8 Co. 43; Co. Lit. 202, 336 b.

The heir shall take advantage of a *nomine pænæ*, for being incident to the rent, it shall descend to the heir, being a security or penalty to secure the payment of the rent; whoever therefore has a right to the rent, ought in reason to have the penalty which is to oblige the tenant to pay it.

Co. Lit. 162 b.

If an abbot and convent covenant to sing for the covenantee and his heirs in such a chapel, his heirs at all times shall have a writ of covenant for the not doing thereof.

2 H. 4, 6, b; 5 Co. 18.

If a man leases for years, and the lessee covenants with the lessor, his executors and administrators, to repair and leave the premises in good repair at the end of the term, and the lessor dies, &c., his heir may have an action upon this covenant, for this is a covenant which runs with the land, and shall go to the heir, though he is not named; and it appears, that it was intended to continue after the death of the lessor, in as much as his executors, &c., are named.

2 Lev. 92, Lougher v. Williams; Skin. 305, S. C. cited.

The plaintiff, as heir, declared, that his ancestor *per indenturam suam, ejus alteram partem sigillo* of the lessee, (omitting *sigillat.*) *hic in curia profert*, did demise, that the lessee covenanted to repair, from time to time, and to leave in repair, and then showed that his ancestor died *anno 10 W. 3*, and for breach assigned, *quod primo apr. anno tertio Regine nunc, et per 10 annos ante tunc*, the premises were out of repair. After verdict for the plaintiff, it was moved in arrest of judgment: 1. That the word *sigillat.* was wanting. 2. That part of the ten years incurred in the life of the ancestor, and that this was a hard action. And *per Holt, C. J.*, The want of *sigillat.* is cured by the verdict and pleading over; and if the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it is a damage to the heir, and the jury give as much in damages as will put the premises in repair; but hereby no damages are given in respect of the length of time they continued in decay, but in respect of what it will cost at the time of the action brought to put the premises in repair; therefore *per decem annos* was frivolous. And he said, that this is not a hard action, and good damages are always given in these cases, because the damages recovered ought to be applied to the repair of the premises.

Vivian v. Champion, 1 Salk. 141; 2 Ld. Raym. 1125, S. C.

If A enfeoffs B upon condition, that if the heir of A pays to B, &c., 20s., then he and his heirs may re-enter; this is a good condition, of which the heir of A may take advantage, and yet A himself never can.

Co. Lit. 214, b.

J S had issue three sons, William his eldest, Nathaniel his second, and

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Daniel his third. William died in the lifetime of his father, leaving issue only a daughter. Afterwards the father devised the estate in question to Anne his wife for her life, and after her death to his son Daniel and his heirs; provided, that if Nathaniel did, within three months after the death of his wife, pay to Daniel, his executors or administrators, the sum of 500*l*. then the said lands should come to his son Nathaniel and his heirs. The wife lived several years after, and during her life Nathaniel died, leaving the plaintiff his heir; and the wife afterwards dying, the plaintiff brought his bill within three months after her death, praying that upon payment of the 500*l*. he might have a conveyance of the estate. And the principal point of the case was, whether this 500*l*. being to be paid by Nathaniel within a limited time, and he dying before that time came, his heir at law could now, on payment of the money, make a title to these lands; for it was agreed that he was not heir at law to the testator. It was insisted upon that he could not: that this was a condition precedent, and merely personal in Nathaniel, who had neither *jus in re*, nor *ad rem*, and could neither have devised, nor released, nor extinguished this condition; and being a bare possibility, and he dying before it was performed, his heir could not make it good; and though the word *heirs* be used in the devise to Nathaniel, yet that is not designed to give them any estate originally, but to denote the quantity of estate which Nathaniel was to take; and for this were cited the cases in the (a) margin. On the other side it was insisted, that this was like the common case in (b) Co. Lit. where a feoffment is made on condition that the feoffor shall before such a day, &c.; there, if the feoffor die before the day, his heir may perform the condition, for the reasons there mentioned; and that it being so at law, it should still be construed more liberally in equity, where the letter of a condition is not always required to be strictly performed; and for this were cited the cases (c) in the margin. That the possibility of performing this condition was an interest or right, or *scintilla juris*, which vested in Nathaniel himself; that he survived the testator; and therefore this differed from Bret and Rigden's case; that, consequently, such right, possibility, or interest, descended to his heir, and might be performed by him as before the statute *de donis*, the possibility of reverter descended to the heir of the donor; and for this were also cited the cases in the (d) margin. The cause being first heard by the master of the rolls, was thought by him a matter of great difficulty, and therefore he appointed the counsel to speak to it when the court was full. Afterwards it was decreed by my lord chancellor, with the assistance of the master of the rolls, for the plaintiff, on Lit. § 334, 335, and my lord chancellor said, that though a condition, in strictness of law was not devisable, yet, since the statute of uses, the devisee may take benefit of it by an equitable construction, &c., and that Nathaniel might have released or extinguished this condition.

Mich. 5 G. 1, between Marks and Marks, in Canc. Eq. Cas; Abr. 106, pl. 6; 10 Mod. 419; Stra. 129, S. C. (a) 10 Co. Lampet's case, Plowd. Brett and Rigden. See too *acc.* 1 P. Wms. 397. (b) Co. Lit. 205, 219, b. (c) 1 Chan. Ca. 89; 3 Chan. Ca. Bertie and Falkland. (d) 2 Saund. 380; Purefoy v. Rogers, Cro. Car. 358; Cro. Ja. 591; 8 Co. Math. Manning's case.

β The heir has a right of action against one who has defaced the tomb or monument of his ancestor; but he has no right of property in the body.

In the matter of the Brick Presb. Church, 8 Edw. 155.

One who erects gravestones to the memory of another, may maintain an action for any injury done to them in his lifetime. After the death of him.



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who erected them, if any injury be done, the heir of him to whose memory the stones were erected, and not the executor of the person who erected them, is entitled to an action.

Sabin v. Harkness, 4 N. H. Cas. 415.*g*

(D) What Conditions, Covenants, &c., shall extend to the Heir so as to bind him.

As the heir at law is the proper and only person who can take advantage of conditions, &c., annexed to the real estate, so shall he be bound by (a) all such conditions, &c., as (b) run with the land, whether such conditions were annexed to the estate by the original feoffor, grantor, or his immediate ancestor.

Roll. Abr. 421. (a) Shall be bound by conditions in law as well as express conditions. Co. Lit. 233; 8 Co. 44; Hard. 11. And though an infant, shall be bound to perform them. But for this vide tit. *Infants*. (b) If the ancestor levies a fine of ancient demesne lands to the prejudice of the lord, an action of deceit lies against the heir. *Zouch v. Thompson*, Salk. 210; *Ld. Raym.* 177; 3 Salk. 35.

If a gift be made in tail, upon condition that the donee shall not discontinue, and the donee have issue two daughters, and one of them discontinue, the donor shall enter and evict them both; because it was the original condition annexed to the whole estate, that no part of it should be discontinued.

Co. Litt. 163 b.

But here we must take notice, that neither tenant in tail, nor his issue, can be restrained from aliening by fine and recovery, though they may be restrained from aliening by feoffment, or other tortuous act, which amounts to a discontinuance.

Vide head of *Estates Tail*.

So, where one devised lands to A and the heirs male of his body, provided, that, if he attempted to alien, then immediately his estate should cease, and B should enter; and A made a feoffment in fee, and thereupon B entered; it was adjudged against B, and that the condition was void, because *non constat* what shall be adjudged an attempt, and how it should be tried.

Vent. 321; 3 Keb. 787, *Piers v. Winn*.

Also, where a condition is annexed to the estate given to the heir, which goes in abridgment and restraint thereof, the same shall in some cases be construed a limitation; for if it were a condition, nobody could take advantage of it but the heir himself.

Dyer, 316; 10 Co. 41; Vent. 199.

As, if a copyholder in borough-english surrenders to the use of his will, and after devises to his wife for life, remainder to his eldest son, paying 40s. to each of his brothers and sisters within two years after the death of his wife, &c., this is a limitation and not a condition; for, if it should be a condition, it would extinguish in the heir, and there would be no remedy for the money.

Cro. Eliz. 204; Wellock and Hammond, 3 Co. 20, 21; 2 Leon. 114, S. C.

So, where one seised of lands in fee, having issue two sons and a daughter, devised to his youngest son and daughter 20*l.* apiece, to be paid by his eldest son, and devised his lands to his eldest son and his heirs, upon condition that if he did not pay the said sums, that then the land should remain to his youngest son and daughter and their heirs, and died; the eldest son entered, and did not pay the money; it was adjudged that the youngest son and

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daughter should have the land; for, 1. This devise to the eldest son and heir, being no more than what the law gave him without such devise, was void. 2. If this should be a condition, it would be defeated by the descent upon the eldest son, who was to perform it; therefore, 3. It was holden to be a devise to the eldest son only, or no longer than till he failed to pay the said sums, and then to the youngest son and daughter, which gives them the land by way of limitation, upon his failing to pay the said sums.

Cro. Eliz. 833, 919; Moor, 644, pl. 891; Noy, 51; Haynsworth and Pretty, adjudged, Vaugh. 271; 2 Mod. 26, S. C. cited.

One devises lands to A his heir at law, and devises other lands to B in fee; and if A molest B by suit or otherwise, he shall lose what is devised to him, and it shall go to B, and dies; A enters into the lands devised to B and claims them; and it was holden, 1. that this was a sufficient breach to give title to B. 2. That if this should be a condition, it would by the descent thereof to A who was to perform it, and also to enter for the breach thereof, be merged and defeated; therefore it was holden to be a limitation, which determined the estate of A, and cast the possession upon B without entry.

2 Mod. 7, Anon.

But, wherever the ancestor makes a conveyance or disposition on condition, which goes in restraint and abridgment of the estate of the heir, he must have notice of it; for having a good title by descent, he is not obliged to take notice of such condition at his peril, as (a) others must do.

8 Co. Francis's case. (a) This diversity is agreed in the case of Fry v. Porter, Vent. 199; Mod. 86, S. C.; 2 Lev. 21, S. C.; Raym. 236, S. C.; 2 Keb. 756, 787, 814, 867, S. C.; 2 Ch. Rep. 26, S. C.

As, where A, seised of lands in fee, and having issue only one daughter, named B, by lease and release conveys his lands to the use of himself for life, and after his death to the use of B in tail, provided that she married (with the consent of the trustees, or the major part of them) some person of the family and name of Fitzgerald, or who should take upon him that name immediately after the marriage; but if not, then the trustees to raise a portion out of the said lands for B, and the lands to remain to C; afterwards A dies, and B marries one who neither was nor took upon him the name of Fitzgerald; the only point upon which judgment was given was the want of notice in B of the settlement, without which, being heir at law, and so having a title by descent, she was not bound, *ex-officio*, to take notice of the condition.

Malloon v. Fitzgerald, 3 Mod. 28; 2 Show. 315, S. C.; Skin. 125, S. C. [Whalley v. Reede, 1 Lutw. 809, S. P.; Burleton v. Humphrey, Amb. 256, S. P.]

β A creditor's lien for the debts of the ancestor may be enforced against a minor as well as against an adult heir, coming into the estate by descent.

Piatt v. St. Clair's heirs, 6 Ohio, 237.g

(E) What Actions he may commence and prosecute in Right of his Ancestor.

It is clear that the heir may bring any real action, or action *droitural*, in right of his ancestor, but cannot regularly bring any personal action, because he has nothing to do with the assets or personal contracts of his ancestor.

Co. Lit. 164. β The next of kin cannot maintain an action, or prosecute a claim for a distributive share of the personal property of the deceased, in their character of next of kin. Wooden v. Bogley, 13 Wend. 453.g

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Also, if an erroneous judgment be given against the ancestor, by which he loseth the lands, the heir may bring (a) a writ of error.

Roll. Abr. 747; Dyer, 90; Godb. 337. (a) That error and attaint always descend to such person, to whom the land should descend as if no such recovery or false oath had been. 1 Leon. 261.

And if one hath lands on the part of his mother, and loseth by erroneous judgment, and dies, the heir of the part of the mother shall have the writ of error.

Leon. 261; 2 Sid. 56.

So the younger son, when entitled to the land by the custom of borough-english, shall bring the writ of error, and not the heir at common law; for this remedy descends with the land.

Owen, 68; Leon. 261; 4 Leon. 5, adjudged; and vide Brig. 79; Roll. Rep. 311.

So, if there be an erroneous judgment against tenant in tail female, the issue female, and not the son shall bring a writ of error.

Dyer, 90; Leon. 261; Roll. Abr. 747.

So, if a man settle land to the use of himself and the heirs of his body, the remainder to his own right heirs, and die, leaving issue only a daughter, who levies a fine, and dies without issue, and J S bring a writ of error as cousin and collateral heir to the daughter; yet he shall never reverse the fine, for there could no right descend to him from the daughter, because she had but an estate-tail, which determined by her death without issue; and it does not appear that the remainder in fee was in the daughter as right heir; wherefore J S shall not reverse the fine, *quia de non apparentibus et non existentibus eadem est ratio*; especially in a court of judicature, where the judges can take notice of nothing that does not come judicially before them, and appear in the pleading.

Dyer, 89; Cro. Eliz. 469; 3 Lev. 36.

If J S bind himself and his heirs in a bond, and thereupon judgment be obtained against J S, and he make his will, and his heir at law executor, and die, leaving lands which descended to his heir; yet he shall not have a writ of error as heir, for he is not privy to the judgment; and when an extent is made upon him, it is as tertenant; but after the lands are taken in execution, he may have a writ of error.

Styl. 38, White and Thomas *per* Roll.

Also, the heir at law may, in right of his ancestor, maintain an action of debt for rent reserved on a lease made by his ancestor, for the rent is part of the lands, and incident to the reversion; but for arrears of rent incurred in the lifetime of the ancestor, neither the heir nor (b) executor could by the common law maintain any action; for as to the heir, they were considered as part of the personal estate; and as to the executor, he could not represent his testator as to any contracts relating to the freehold and inheritance.

11 H. 6, 15; 19 H. 6, 41; Co. Lit. 162 a. (b) But now by 32 H. 8, c. 37, an executor may maintain an action of debt for such arrears; for which vide tit. *Debt*, letter (C).

If a nobleman, knight, esquire, &c., be buried in a church, and have his coat of arms, and penons with his arms, and such other ensigns of honour as belong to his degree or order, set up in the church; or if a gravestone or tomb be laid or made, &c., for a monument of him; in this case, albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson, or any, take them or deface

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them, but he is subject to an action by the heir and his heirs, in the honour and memory of whose ancestor they were set up.

Co. Lit. 18 b; for this vide Roll. Abr. 625; Nov, 104; Godb. 200; Cro. Ja. 367; 2 Bulst. 151. || So, Corven's case, 12 Co. 104. The action is maintainable by the wife or executors who first set them up, and afterwards by the heirs. Lady Gray's case, cited by Coke, C. J., in *Pym v. Gorwyn*, Moore, 878; Dame Wyche's case, 9 E. 4, 15, cited by Coke, C. J., in 12 Co., and also in Godb. 200.||

β Covenants real run with the land, and go to the heir, and not to the executor.

Fowler v. Lewis, 3 Marsh, 446.g

|| On a covenant for further assurance where the breach happened in the time of the covenantee, but the damage accrued to the heir, the heir has a preferable title to the executor to bring the action.

King v. Jones, 5 Taunt. 418; 1 Marsh. 107; and see *Jones v. King*, 4 Maule & S. 188.||

(F) Where the Heir shall be said to be bound to answer his Ancestor's Debts and Contracts.

WHERE the ancestor binds himself and his heirs in an obligation, the obligee may sue his heir (α) or executor at his election, and may have execution of the land descended to the heir; for the common law having allowed the action of debt against the heir, he could have no benefit by the action, unless he were permitted to have execution of the lands which descended to the heir.

Plowd. 441; 3 Co. 12 a; Cro. Ja. 450. β The heir cannot be charged upon the assumption of the executor, when he would not be otherwise charged. Searcy's heirs v. Reardon, 3 Bibb, 528.g (α) And. 7. Or the administrator of the ancestor, 3 Lev. 189, adjudged on demurrer.—May sue the same person, being both heir and executor. Also, may sue the executor for part, and the heir for the residue. But, if the heir or executor pay the whole or part, and afterwards the other be sued, there shall be relief in an *audita querela*. 3 Lev. 330, 334, 335.—Where the heir, being likewise administrator, and having real assets by descent, discharged a bond debt, in which he was bound, which he insisted was out of the personal estate; the Court of Chancery would not admit of this construction, to the defeating of the simple contract creditors. Abr. Eq. 44. β If the heir or devisee pay the debt of the ancestor, he may obtain reimbursement from the personalty, that being the proper fund for the payment of debts. *Hammond v. Hammond*, 2 Bland, 307; *Ellicote v. Welch*, 2 Bland, 242; *Tessier v. Wise*, 3 Bland, 28.g

But the body of the heir is protected, for it would be most unreasonable to subject the heir to the payment of his ancestor's debt, any further than the value of the assets descended.

Dyer, 81, pl. 62. β Heirs are liable only to the value of the estate descended, and they are not chargeable with interest on that value. *Ellis v. Gosney's heirs*, 7 J. J. Marsh. 110.g [And if he pay his ancestor's debts to the value of the land descended, he shall hold the land discharged from the other debts of the ancestor. *Buckley v. Nightingale*, 1 Str. 665; Ca. temp. Talb. 109.] || But he cannot plead, that he claims to retain a certain sum for money laid out in repairing the tenements descended. *Shetelworth v. Neville*, 1 T. R. 454.||

β An heir who pays off a judgment against his ancestor is not entitled to demand contribution of a purchaser of his land, subject to the judgment. But if the portion of one heir has been taken to pay the debt of the ancestor, he is entitled to contribution from his co-heirs.

Clowes v. Dickerson, 5 Johns. Ch. R. 240.

An heir is not bound by the covenants of his ancestor further than the real assets descended to him, and to the amount of his distributable share in his ancestor's personal estate.

Holder v. Mount, 2 J. J. Marsh. 189.g

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Also, the heir must be (a) expressly named, otherwise he is not chargeable. And the reason why the heir is not chargeable in this case, as the executor is in case of a bond entered into by the testator, without being named, is this: By the common law only the goods and chattels of the debtor, and the annual profits of the land as they arose, and not the land itself, were liable to execution for debt or damages, because these being the security the creditor depended upon, they were liable in the hands of his representative, or executor, as well as in the hands of the debtor himself; and hence it was, that the executor was bound to answer the debt of the testator, so far as he had chattels or assets, though he was not named in the contract. But the land was not liable to execution, because it was preserved from the personal contracts and engagements of the tenant, that he might be the better able to answer the feudal duties to the lord, which were the life and support of the government; and therefore the land, not being originally liable to the demand in the hands of the obligor, must be much less liable in the hands of the heir, who was not comprehended in the contract.

2 Inst. 19; Plowd. 440; Hob. 60; vide tit. *Execution*, letter (A). (a) And therefore no action will lie against the heir for the escape of one in execution suffered by the ancestor, nor for any tort or trespass of his. Also, if the ancestor be condemned in an obligation, and die, execution shall be taken out by *elegit*, and not of all the lands descended. Dyer, 271 a, pl. 25. β At common law the heir was not bound by the contracts or fraud of the ancestor unless expressly named. A parol contract, therefore, cannot bind the heir. *Moore v. Fantleroy*, 3 A. K. Marsh. 363. g——\* But the heir shall answer for the escape of a prisoner in execution on a statute-merchant, by the St. de Mercator. 13 Ed. 1, stat. 3, and vide *infra*.

But, if A hath granted, for him and his heirs, to B and his heirs, such a rent out of his lands; in this case the heirs being comprehended in the contract are bound to make good the grant, so far as they have assets by descent from the grantor. And this was allowed at common law, because the grantee of the rent had the land originally in view for his security, and by the grant itself having it in his power to distrain the land for the rent, it was equal to the heir whether the land was to answer the rent by distress, or by an execution upon a judgment in a writ of annuity.

Roll. Abr. 226; Poph. 87; Hob. 58; Dyer. 344, b; Co. Lit. 144, b.

If the ancestor binds himself in a statute, recognisance, &c., the heir is liable not only as tertenant, but also as heir, otherwise he could not have his age; and cannot oblige a purchaser, whether for valuable consideration, or without, to contribute. But one heir may oblige another to contribute; as, if a man seised of two acres, the one descendible according to the course of the common law, the other in borough-english, acknowledge a statute, &c., the heir at law shall oblige the heir in borough-english to contribute. So, one coparcener shall oblige the other to contribute; or, if the conusor hath lands, some descendible to the heirs of the father, and some descendible to the heirs of the mother, the heir on the part of the father shall compel the heir on the part of the mother to contribute; *et sic vice versâ*.

3 Co. 12, Sir William Herbert's case.

By the common law, if the heir before an action brought against him had aliened the assets, the obligee was (b) without any remedy; but, if he only aliened pending the writ, the lands, which he had by descent at the time of the (c) original purchased, were liable.

Co. Lit. 102. [It seems that before the statute he was responsible in equity for the value of the land aliened before action brought, 1 P. Wms. 777.] (b) Upon a motion for a new trial, Twisden said, that, in his practice, the heir in an action of

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debt against him upon a bond of his ancestor pleaded *riens per descent*: the plaintiff knew the defendant had levied a fine, and at the trial it was produced; but because they had not a deed to lead the uses, it was urged, that the use was to the conusor and his heirs, and so the heir in by descent; whereupon there was a verdict against him; and being a just debt, they could never after get a new trial. *Smith v. Higgins*, 1 Mod. 2; in *B. R. Mich. 14 Geo. 2, S. P.* (c) Or filing a bill in *B. R.* which to this purpose has been holden as effectual as an original writ. *Carth. 245.*

In consequence of this doctrine, that the lien shall have relation to the time of the original purchased, it hath been adjudged, that where there were two creditors to *J S*, whose heir was bound, viz., *A* and *B*, and *A* filed an original in *C. B.* and had judgment thereon, *Trin. Term, 2 Jac. 2*, by default, and thereupon a general *elegit* issued against all the lands of the heir, and a moiety thereof was delivered to *A*; and *B* on a bill filed in *B. R. 1 & 2 Jac. 2*, had a special judgment against the assets confessed by the heir, *Trin. Term, 3 Jac. 2*; though *B*'s judgment be subsequent to *A*'s, yet it appearing that his bill or original was filed before *A*'s, the judgment should have relation thereto, and therefore he was to be first satisfied.

*Carth. 245*, *Gree and Oliver*, adjudged; and *North's* opinion, *Mod. 253*, that he who first obtains judgment shall be satisfied, denied to be law.

So it seems in the above case, that though *A*'s judgment had been on an original actually filed before *B*'s, *B* must have been preferred, because his (*A*'s) judgment was general against the heir, and the execution a general and common execution by *elegit*, and not against the assets only by way of extent; and therefore such a general judgment will not operate by way of relation to the original, but binds only as in common cases, from the time of the judgment given.

*Carth. 246, per Cur.*

But to prevent the wrong and injury to creditors by alienation of the lands descended, &c., by the (a) 3 & 4 W. & M. c. 14, § 5, (b) it is enacted, "That in all cases, where any heir at law shall be liable to pay the debt of his ancestor in regard of any lands, tenements, or hereditaments descending to him, and shall sell, alien, or make over the same before any action brought or process sued out against him, that such heir at law shall be answerable for such debt or debts in an action or actions of debt to the value of the said land so by him sold, aliened, or made over; in which cases all creditors shall be preferred as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments *bonâ fide* aliened before the action brought, shall not be liable to such execution."

(a) A bill was brought in Chancery against the heir and his alienee, and the creditor relieved, though it was objected, that the statute being introductive of a new law, the relief on it ought to have been at common law. *Abr. Eq. 149.* (b) Made perpetual by 6 & 7 W. 3, c. 14.

§ 6. "Provided, That where any action of debt upon any specialty is brought against any heir, he may plead *riens per descent* at the time of the original writ brought, or the bill filed against him; any thing herein contained to the contrary notwithstanding: And the plaintiff in such action may reply, that he had lands, tenements, or hereditaments from his ancestor before the original writ brought, or bill filed: And if, upon issue joined thereupon, it be found for the plaintiff, the (e) jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judg-

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ment shall be given, and execution shall be awarded as aforesaid ; but, if judgment be given against such heir by confession of the action without confessing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, tenements, or hereditaments so descended.

(c) || In *Jeffry v. Barrow*, 10 Mod. 18, Powis, J., and Eyre, J., were of opinion, that by "the jury" in this clause must be understood the jury who tried the cause ; and, consequently, if that jury omitted to inquire of the value of the lands, such omission could not be supplied by another jury.||

Also, if before this statute, the ancestor had devised away the lands, a creditor by specialty had no remedy either against the heir or devisee.  
Abr. Eq. 149.

But now by the said statute 3 & 4 W. & M. c. 14, reciting that several persons had by bonds or other specialties bound themselves and their heirs, and had afterwards by will disposed of their lands, with an intent to defraud their creditors ; it is enacted, § 2, "That all wills and testaments, limitations, dispositions, or appointments of or concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person or persons at the time of his, her, or their decease shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed and taken (only as against such creditor or creditors as aforesaid, his, her, and their heirs, successors, executors, administrators, and assigns, and every of them) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect ; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding."

§ 3. "And for the means that such creditors may be enabled to recover their said debts, it is further enacted, That in the cases before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt, (a) upon his, her, and their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee and devisees jointly, (b) by virtue of this act ; and such devisee or devisees shall be liable and chargeable for (c) a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended."

(a) || In *Wilson v. Knubley*, 7 East, 128, a question arose, whether this statute gave an action of covenant against the devisee, such an action having been brought against the devisee only, the heir being dead without having an heir ; but it was holden, that it did not ; *Grose, J.*, observing, that at common law, neither debt nor covenant could have been maintained against the devisee, but the legislature had given a remedy against him by this clause ; that remedy, however, was express, and confined to the action of debt. And though the word "specialties" is used as well as bonds, yet, construing the whole together, it must be confined to those specialties on which an action of debt lies.|| (b) [So, in equity, the heir must be made a party with the devisee. *Gawler v. Wade*, 1 P. Wms. 99 ; *Warren v. Stawell*, 2 Atk. 125.] (c) Vide 29 Car. 2, c. 3, § 10, 11, by which, although the heir of the *cestui que trust* is made liable to answer, &c., yet by reason of any kind of plea, or other matter, he shall not be chargeable to pay the condemnation out of his own estate.

§ 4. "Provided, That where there hath been or shall be any limitation or appointment, devise or disposition of or concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real or just debt or debts, (d) or any portion or portions, sum or sums of money for any child or children of any person, other than the heir at law,

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according to or in pursuance of any marriage contract or agreement in writing *bonâ fide* made before such marriage, the same, and every of them, shall be in full force, and the same manors, messuages, lands, tenements, and hereditaments shall and may be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised, or disposed, until such debt or debts, portion or portions shall be raised, paid, and satisfied; any thing contained in this act to the contrary notwithstanding."

(d) || It is holden, that this proviso operates by way of exception upon such devises as are for the payment of debts, leaving the law just as it stood before the making of the act, *Plunket v. Penson*, 2 Atk. 292; and therefore a devise of land in trust to sell for payment of debts is not within the statute. *Earl of Bath v. Earl of Bradford*, 2 Ves. 590; *Gott v. Atkinson*, Willes's Rep. 521; *Barnes*, 164, S. C. Nor is a devise for payment of debts *out of the rents and profits only*. *Ridout v. Earl of Plymouth*, 2 Atk. 104; *Lingard v. Earl of Derby*, 1 Br. Ch. Rep. 311; *Bailey v. Ekins*, 7 Ves. 323. But, if the devisor does not provide for the payment of debts in a manner which is practicable, and can be enforced, it is a fraudulent devise within the statute. *Hughes v. Doulsen*, 2 Br. Ch. Rep. 614. || [If there be, therefore, a devise, subject to the payment of debts, simple contract creditors will be entitled to be paid *pari passu* with bond or other specialty creditors; for in conscience their debts are to be equally favoured, being equally due. *Woolstencroft v. Long*, 1 Ch. Ca. 32; 3 Ch. Rep. 7; *Hixon v. Witham*, Ch. Ca. 248; *Anon.* 2 Ch. Ca. 54; *Girling v. Lee*, 1 Vern. 63; *Child v. Stephens*, *Ibid.* 101; *Sawley v. Gower*, 2 Vern. 61; *Wilson v. Fielding*, *Ibid.* 763. And such a devise will admit creditors whose debts are barred by the statute of limitations. *Goften v. Mill*, 2 Vern. 141; *Pr. Ch. 9*, S. C. And though it hath been holden in some cases, that if the estate be devised to the executor for payment of debts, this will make it legal assets; yet it seems to be now settled that the circumstance of giving the real estate by any means to the executor, shall not occasion the produce of it when sold, to be applied, as it would in the ecclesiastical court; but it must nevertheless be considered as equitable assets. *Per Lord Thurlow*, *Newton v. Bennet*, 1 Br. Ch. Rep. 135. See also *Silk v. Prime*, 1 Br. Ch. Rep. Addit. 7. But a devise of the real estate to the heir, charged with the payment of debts, does not break the descent; *Allam v. Heber*, 2 Str. 1270; *Emerson v. Inehbird*, *Ld. Raym.* 728; *Clerk v. Smith*, 1 Salk. 241; 1 Lutw. 793; *Hurst v. Earl of Winchelsea*, 2 Burr. 879; 1 Bl. Rep. 187. The estate, therefore, will be legal assets. *Freemoult v. Dedire*, 1 P. Wms. 429; *Plunket v. Penson*, 2 Atk. 290. || But it is now settled, that a charge, though it may not break the descent, makes equitable assets. *Bailey v. Ekins*, 7 Ves. 319; *Shepherd v. Lutwidge*, 8 Ves. 26. ||

And it is further enacted by the said statute, § 7, "That all and every devisee and devisees made liable by this act, shall be liable and chargeable in the same manner as the heir at law, by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before action brought."

|| Devisees being put on the same footing with heirs by this clause, it follows, that lands aliened by a devisee before suit brought by a creditor of the testator are equally protected in the hands of the alienee as if they had been so alienated by the heir; though there is no express provision in the statute to protect the alienee of the devisee, as there is the alienee of the heir, *Matthews v. Jones*, 2 Anstr. 506; and that the lands and tenements devised must be described with the same particularity in the case of the devisee, as is requisite in that of the heir. *Gott v. Atkinson*, Willes's Rep. 521. But an infant devisee is not entitled under this statute to plead his nonage, and pray that the parol may demur, as an infant heir may do. *Plasket v. Beeby*, 4 East, 485. ||

In the construction of this statute it hath been holden, that, though a man is prevented thereby from defeating his creditors by will, yet any settlement or disposition he shall make in his lifetime of his lands, whether voluntary



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or not, will be good, against bond creditors; for that was not provided against by the statute, which only took care to secure such creditors against any imposition, which might be supposed in a man's last sickness; but, if he gave away his estate in his lifetime, this prevented the descent of so much to the heir, and, consequently, took away their remedy against him, who was only liable in respect of the lands descended; and as a bond is no lien whatsoever on lands in the hands of the obligor, much less can it be so when they are given away to a stranger.

Abr. Eq. 149, *Parslow v. Weedon*. [Mr. Vernon, in referring to this case, in Pr. Ch. 521, observed, that till this resolution, he should have been of another opinion, for that such a disposition had been holden fraudulent by Lord Holt, in the case of *Templeman v. Beke*. And Mr. Vernon's dissatisfaction is taken notice of by Lord Talbot, in *Jones v. Marsh*, Ca. temp. Talb. 64.]

In debt against an heir, who pleaded *riens per descent* on the day of the bill, the plaintiff replied specially, that the obligor (father of the defendant) died on such a day, and that the defendant (after the death of his father) and before the day of the bill, viz., on such a day, which was a day after the death of the obligor, had lands by descent from his father in fee-simple, *unde prædict.* (the plaintiff) *de debito prædicto satisfecisse potuit, viz., apud H. prædict. et hoc parat. est verificare unde petit judicium*, according to the above statute. To this the defendant made a frivolous rejoinder; and thereupon the plaintiff demurred. The question was, if the replication was good in pursuance of the statute; for it was objected that it was ill, because the plaintiff had put the value of the lands in issue by these words, *unde, &c., de debito prædicto satisfecisse potuit*, which ought to have been omitted, because the statute is express, that after the issue tried the jury shall inquire of the value; so that it is matter of inquest only *ex officio*, and not to be the point of the issue; and by this statute the plaintiff is only to recover *pro tanto* against the defendant with respect to the value of such aliened assets, and is not to have a general judgment against the heir, as at common law upon a false plea. *Sed per Cur.* upon debate, this replication is good, and as it ought to be, and that if *unde, &c., de debito prædicto satisfecisse potuit* had been left out, it might have been a good cause of objection; for the statute doth not give occasion to alter any more of the form of the replication common in such cases, but only as to the time concerning assets by descent; and the conclusion, which (before the statute) was to the country, must now be with an averment only, because the defendants may have an opportunity to answer the new matter alleged in the replication.

Carth. 353, *Redshaw v. Hester*, adjudged; 5 Mod. 122, S. C.; Comb. 344, S. C. adjudged, and that the statute was made not to create but to prevent difficulties in pleading.

It seems that neither before nor since this statute the (a) executor or administrator of the heir is liable; for the person of the heir is not chargeable, but with respect to the land; and if, before the statute, the heir had aliened before action brought, he should not be charged for the profits he received; which is evident from the plea of *riens per descent* the day of the writ purchased; much less then could his executor; (b) for an executor is but in nature of a trustee for the personalty, and not at all privy to the inheritance.

Trin. 32 Car. 2, in C. B. between Baron Weston and Danby, adjudged.  $\beta$  In an action at law against the heir upon an issue of *rien per descent*, he cannot be charged as for assets by descent, with lands fraudulently conveyed by his ancestor to a third person, and held by him to the exclusion of the heir. *Harrison v. Campbell*, 6 Dana,

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267.g. (a) But for this vide 2 Chan. Cases, 175; Vern. 400, and Dyer, 344, a precedent cited in the book of entries, where debt was brought against the executor of an heir upon a bond made by the ancestor, which is also mentioned in Rast. Entr. 172 b, p. 4; Plow. 441; 2 Leon. 11; 3 Leon. 70. But the heir of an heir is liable. F. N. B. 120 b, note c; Dy. 368 a, p. 46; Cro. Car. 151; Carth. 129. (b) But *quære et vide* 2 Vern. 62, where it is said, that if the heir aliens the land to prevent the creditors from having satisfaction of their debts, equity will follow the money into the hands of the heir or his executor.

If there be judgment in debt against two, and one die, a *scire facias* lies against the other alone, reciting the death, and he cannot plead that the heir of him that is dead has assets by descent, and demand judgment if he ought to be charged alone; for at (a) common law the charge upon a judgment being (b) personal survived, and the statute of Westm. 2, which gives the *elegit* does not take away the remedy of the plaintiff at the common law, and therefore the party may take out his execution which way he pleases; for the words of the statute are, *sit in electione*; but if he should, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or by *audita querela*.

Lev. 30; Raym. 26; Keb. 92. S. C. Edsar and Smart. (a) So adjudged. 1 E. 3, 13, pl. 41, and vide 29 Assize, pl. 37; 29 E. 3, 29. (b) For the difference between a real and personal execution; and that a personal execution will survive, though a real one will not, vide 3 Co. 14; Yelv. 209; Raym. 153; 2 Keb. 3, 331; 4 Mod. 315; 3 Keb. 295; Salk. 319, 320; Show. 402.

If there be a sequestration for a personal duty against the ancestor where the heir is not bound, and the defendant die, there is an end of the sequestration, and it cannot be revived against the heir; because neither the heir nor the lands are bound by such decree. But, if the decree be upon a covenant that bound the heir, and the defendant die, such decree may be revived by *subpœna scire facias* against the heir to show cause against the decree, if the decree be enrolled of record; or if not, by bill of revivor; and when revived against heir and executor, (which is the usual and regular way,) the sequestration also will be revived on motion, if, upon coming into court, cause is not shown why the decree should not be revived. And in this case it hath been resolved, that the decree should have the same authority to bind the personal assets as a judgment at law, and therefore shall go *pari passu* to be paid off and discharged; but the lien of the judgment upon lands came in by the statute, which only gives an *elegit* for a moiety of the land in satisfaction of the debt, and therefore that could give no authority to lay a sequestration on the real estate for a mere personal duty, where the heir is not bound in the covenant.

Harding v. Edge, 1 Vern. 143; Shafto v. Powell, 3 Lev. 355; Searle v. Lane, 2 Vern. 37, 88; Morrice v. Bank of England, Cas. temp. Talb. 217; 2 Br. P. C. 465, 8vo. ed. S. C.; Martin v. Martin, 1 Ves. 211; Conner v. Browne, 1 Ridgw. P. C. 139,

[The plaintiff may join issue on the plea *riens per descent*, without replying, as he is empowered by the statute; and in such case the jury are not to set out the value of the lands descended; it is sufficient for them to find that lands came by descent, sufficient to answer the debt and damages.

Matthews v. Lee, Barnes, 444.

To a plea of *riens per descent al temps del original*, the plaintiff replied that the defendant had sufficient lands before the time of the original purchased, and on issue thereon, a verdict was given for the plaintiff, but no inquiry of the value of the land; the court awarded a repleader; for

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issue ought not to have been\* joined on the sufficiency of the land descended.

*Jefferys v. Barrow*, P. 12 Ann. Bull. Ni. Pri. 176; 10 Mod. 18, S. C.  $\beta$  At common law, the heir who aliened the land descended before action brought, might discharge himself by pleading nothing by descent at the suing out of the writ: but, still, a court of equity held him responsible for the value of the land. *Coxe's heirs v. Strode*, 2 Bibb, 378. He was not however liable for the rents he had received since the death of the intestate. *McCoy v. Scott*, 2 Rawle, 222; *Goodrich v. Thompson*, 4 Day, 215; *Harrison v. Wood*, 1 Dev. & Bat. Eq. 439; *Trent v. Trent*, Gilm. 174; *Adams v. Adams*, 4 Watts, 160.*g*

The heir cannot have two defences, one at common law, and one on the statute: therefore, if to *riens per descent al temps del writ*, the plaintiff reply, that before that time lands descended; the heir cannot rejoin that he sold them, and paid bond debts to the amount; he ought to disclose the whole in his bar at once.

*Winder v. Barnes*, P. 15 Geo. 2, Bull. Ni. Pri. 176.]

|| By the 1 W. 4, c. 47, *An act for consolidating and amending the laws for facilitating the payment of debts out of real estate*, the 3 & 4 W. & M. c. 14, the 6 & 7 W. 3, c. 14, 4 Ann. c. 5, (Irish,) and the 47 G. 3, c. 74, are repealed, but so as not to affect any of the provisions and remedies of the said acts, to the benefit of which all persons are entitled, as against any estate or interest in any lands, &c., or real estate of any person who died before the passing of the act.

By § 2, it is enacted, that all wills and testamentary dispositions of or concerning any manors, lands, &c., or any rent or profit, &c., out of the same, whereof any person shall be seised in fee, in possession, reversion, or remainder, or have power to dispose of the same by will or testament, shall be deemed and taken (only as against such persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them with whom the person or persons making such will or testament, &c., shall have entered into any bond, covenant, or other specialty binding his, her, or their heirs) to be fraudulent and void, and of none effect.

By § 3, in the cases before mentioned, every such creditor shall and may have and maintain his action of debt or covenant (a) upon the said bonds, covenants, and specialties against the heir at law of such obligor or covenantor, and such devisee or the devisee of such first-mentioned devisee (b) jointly by virtue of this act, and such devisee shall be liable and chargeable for a false plea in the same manner as any heir should have been for any false plea, or for not confessing the lands to him descended.

(a) See 7 East, 127. (b) See 3 Atk. 460.

By § 4, in case there shall not be any heir at law against whom jointly with the devisee a remedy is thereby given, every such creditor may maintain his action of debt or covenant, as the case may be, against such devisee or devisees solely, and such devisee shall be liable for false plea as aforesaid.

By § 5, it is provided, that where there hath been or shall be any limitation or appointment, devise or disposition of or concerning any manors, messuages, &c., for the raising or payment of any real and just debts, or any portion or sum for any child of any person in pursuance of any marriage contract *bonâ fide* made before such marriage, the same shall be in full force, and the same manors, &c., shall be holden and enjoyed by every such person, his, her, and their heirs, executors, administrators, and assigns for whom the said limitation, appointment, &c., was made,

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and by his, her, and their trustee or trustees, heirs, executors, administrators, and assigns for such estate or interest as shall be so limited or appointed, &c., until such debt or portion shall be raised and satisfied.

By § 6, in all cases where any heir at law shall be liable to pay the debts or perform the covenants of his ancestor in regard of any lands, &c., descended to him, and shall sell or alien the same before any action brought, such heir shall be answerable for such debts or *covenants* in an action of *debt of covenant* to the value of the lands aliened, in which cases all creditors shall be preferred as in actions against executors and administrators, and such execution shall be taken out upon any judgment so obtained against such heir to the value of the land, as if the same were his own proper debt, saving that the lands, &c., *bonâ fide* aliened before the action brought, shall not be liable to such execution.

By § 7, it is provided, that where any action of debt or covenant upon any specialty is brought against the heir, he may plead *riens per descent* at the time of the writ brought or the bill filed against him, any thing herein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, &c., from his ancestor before the writ brought or bill filed, and if upon issue joined it be found for the plaintiff, the jury shall inquire of the value of the lands, &c., and thereupon judgment shall be given and execution awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer, or *nil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands, &c., so descended.

By § 8, it is provided that all devisees made liable by this act, shall be liable and chargeable in the same manner as the heir, by force of the act, notwithstanding the lands, &c., devised shall be aliened before action brought.

By § 9, where any person being at his death a trader within the meaning of the bankrupt laws, shall die seised of or entitled to any estate, &c., in lands not by his will devised, subject to debts, and which would be assets for payment of his debts due on any specialty in which the heir is bound, the same shall be assets to be administered in courts of equity, for payment of the debts of such person, as well debts due on simple contract as on specialty; and that the heirs or devisees of such debtor, and the devisees of such devisees, shall be liable to all the same suits in equity, at suit of any creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of such creditors by specialty, in which the heirs are bound; provided that in the administration of assets under this provision, all creditors by specialty, in which heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands.

By § 10, the parol shall not demur in actions or suits by or against infants.

By § 11, it is provided that in case the heirs or devisees are infants they may convey estates ordered to be sold under the direction of the Court of Chancery.

By § 12, where any lands, &c., are devised in settlement, by any person whose estate under this act, or by law, or by his will, shall be liable to his debts, and by such devise are vested in any person for life, or other limited interest, with any remainder or gift over, which may not be vested, or may

(H) Where he shall be liable himself, &amp;c.

be vested in some person from whom a conveyance cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof, for payment of such debts or any of them, it shall be lawful for the court by whom such decree shall be made to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey, release, &c., or otherwise assure the fee-simple or other the whole interest, so to be sold, to the purchaser, or in such manner as the said court shall think proper; and every such conveyance, &c., or other assurance, shall be as effectual as if the person who shall execute the same were seised or possessed of the fee-simple or whole estate.||

(G) How to be proceeded against where he is bound.

If the heir be sued upon a bond or covenant in which he is bound, it need not be shown how he is heir; for the plaintiff is a stranger, and it would be hard to compel him to set forth another's pedigree: but, where the heir sues, he must show his pedigree, and *coment haeres*; for it lies in his proper knowledge.

Salk. 355. But for this vide case of Kellow v. Rowden, Carth. 126; 3 Mod. 25; Show. 248; 3 Lev. 286.  $\beta$  Persons suing as heirs must prove themselves to be so, unless expressly or by implication admitted to be so. Oldam v. Rowan, 3 Bibb, 539. See Taylor v. Whiting, 4 Monroe, 367.g.

It must be alleged, that the heir was bound; and therefore, where a bill was brought by the obligee in a bond against the heir of the obligor, alleging, that he, having assets by descent, ought to satisfy this bond; the defendant demurred, because the plaintiff had not expressly alleged, in the bill that the heir was bound in the bond; and though it was alleged that the heir ought to pay the debt, yet it was holden insufficient, and the demurrer was allowed.

Vern. 180, Crosseing v. Honor.

If an action be brought against the heir upon the bond of his ancestor, in which the heir is bound, it must be in the (a) *debet* and *detinet*; because he hath the assets in his own right, and therefore is to be sued as if it were his own bond.

5 Co. 36, a; Plowd. 440; Dyer, 344, pl. 6; Jon. 87; Lev. 130; Cro. Eliz. 712, S. P. and the reasons there given, because he is bound by special words in the obligation, et vide 2 Leon. 11; 2 Brownl. 204, 205; Cro. Eliz. 350, like point. (a) But, if in the *detinet* only, it is good after verdict by the 16 & 17 Car. 2, c. 8. Comber and Watten, Lev. 224, adjudged. Sid. 342, 575, S. C.

[In a declaration against the heir on a covenant that runs with the land, the plaintiff may charge him as assignee; for evidence that the land descended to him as heir of the lessor will support such an issue.

Derisley v. Custance, 4 T. R. 75;  $\beta$  Fowler v. Lewis, 3 Marsh, 446

When the heir is bound in the bond of the ancestor, he is liable to an action when land has descended to him, notwithstanding there may be personal assets in the hands of the executor.

Long's heirs v. Baker, 2 Hay. 128.g

(H) Where he shall be liable himself, and the Judgment general or special: And herein,

1. Where he shall be liable for his false pleading.

THE heir at law, though bound by his ancestor, shall yet, as hath been observed, be chargeable no further than he has assets from such ancestor,

(H) Where he shall be liable himself, &c.

unless by false pleading he make himself so : And therefore if an action of debt be brought against him, and he confess the action, and also set forth in certainty what assets he hath, he shall be charged no further ; and neither his goods (a), body, nor other lands, shall be liable ; but the judgment in such case shall be special, to recover the debt of the land descended.

21 E. 3, 10 ; 40 E. 3, 14 ; Dyer, 81, pl. 62, 149, pl. 80 ; Plowd. 440 ; Benl. 157 ; 5 Co. 35 ; 2 Roll. Abr. 70, and the same point admitted in all the modern books. (a) And therefore an heir at law is not to be holden to special bail, because the demand is not on the person, but on the assets of the deceased. 2 Jon. 82, and vide tit. *Bail*, letter (B).

But, if an action (b) of debt be brought against an heir on the obligation of his ancestor, in which he is bound, and he plead *riens per descent*, which is found against him, the judgment shall be general\* to recover the debt, which he must pay out of his own pocket for his false plea.

Vide the authorities *sup.* and Roll. Abr. 269 ; Roll. Rep. 234. β An heir is not liable for costs *de bonis propriis*, when he pleads the general issue and *riens per descent*, which last is admitted by the plaintiff, and the first is found against him. Van Patten v. Badger, 1 Wend. 69. g (b) But there is a diversity between an action of debt and a *scire facias* against the heir upon a judgment had against his ancestor ; for if in a *scire facias* the heir plead a false plea, and it be found against him, yet the judgment shall be of the lands descended only ; for the execution in such case shall be upon the first judgment against the ancestor, and not upon the judgment in the *scire facias*, *quod habeat executionem*, because such judgment did not alter nor enlarge the first judgment. Bower v. Rivett, adjudged ; Pas. 193 ; 3 Bulst. 317 ; Jon. 87 ; Cro. Car. 296 ; Carth. 93, S. C. cited. β If an heir plead to a *sci. fa.* nothing by descent or by devise, and it be found against him, judgment shall be *de bonis propriis*. Hamilton v. Simms, 2 Hay. 291. g \*And execution in his own lands and goods, and against his body by *capias ad satisfaciendum*, like as for his own debt. Plowd. Com. 440 a ; 2 Roll. Abr. 70, l. 40 ; Dyer, 149 a ; 2 Leon. 11 ; Poxon v. Smart, C. B. Hil. 4 G. 2 ; 1 Selw. N. P. 545.

So, if an action of debt be brought against the heir, who confesses the action, but does not set forth the assets in certainty, the judgment shall be general ; for he is charged in *debet* as well as *detinet*, and assets shall be presumed.

Plowd. 440 ; 2 Roll. Abr. 70 ; Smith v. Angell, Ld. Raym. 783.

So, if an action be brought against the heir on the bond of his ancestor, and there be judgment against him by default, *non sum informatus, nihil dicit, &c.*, the judgment against him shall be general, and he shall be charged *de bonis propriis*.

Plowd. 440 ; Davis and Pepys, adjudged, and cited, and agreed to be law in several books.

So, where debt was brought against an heir, who pleaded in bar that J S was jointly and severally bound with his ancestor, and that he paid the money ; which being found against him, it was holden that the judgment should be general, and he for his false plea chargeable *de bonis propriis*.

Carth. 93, Bradlin v. Milbank, adjudged, and said that the law was so settled in the case *supra* of Davis and Pepys. Plowd. 440 ; Comb. 162, S. P. adjudged. β When a bond creditor institutes a suit against the heir of an intestate, and the defendant pleads a false plea, the court will, after a decree obtained in a suit by another creditor for the administration of the intestate's assets, restrain the plaintiff at law from taking out execution against the assets, but not from proceeding against the heir personally. Price v. Evans, 4 Sim. 514. g

So, where the heir pleaded that his ancestor was seised in fee of three fourth-parts of such and such tenements, and that he demised the same for 500 years to A, who entered, and that the said reversion descended *et riens ultra*, and that at the time of the action brought he had no tenements in fee-

(II) Where he shall be liable himself, &c.

simple by descent *præterquam* the said reversion; and that afterwards there was a bill in Chancery exhibited against him by the ancestor's wife for dower, and a decree obtained against him for the third part of these three-fourths for the wife's life; *et hoc*, &c., in this case a general judgment was given against him; and it was holden by Holt, C. J. 1st, That an heir could not plead a term for years in delay of present execution, but ought to confess assets; and that the common law had no regard for a term for years, and that there is no mischief in this case; for though in consequence a *levari facias* may go, yet the lessee may maintain himself against an ejectment by virtue of his lease. (a) 2. As to the decree in Chancery, he held it plain that there was no estate or interest vested in the wife by that, so that the plea in this respect is naught and most apparently false.

Smith v. Angell, Salk. 354; Ld. Raym. 783, S. C.; 7 Mod. 40, S. C.; Villers v. Handley, 2 Wils. 49. (a) || So, where an ejectment was brought on the return of an *elegit* against the defendant, who was in possession of the premises under a lease for years prior to the date of the plaintiff's judgment, the judges who tried the cause, being of opinion that the defendant, having a legal title antecedent to the plaintiff's, ought to prevail, though the defendant had received a notice from the plaintiff, that he did not intend to disturb his possession, directed a nonsuit, which was afterwards confirmed by the court. Doe v. Wharton, 8 T. R. 2. ||

And it is said, that in these cases the court cannot give a special judgment without the assent of the plaintiff; as, where debt was brought against the heir, who pleaded *riens per descent*, which was found for the plaintiff; and there being judgment to recover the debt, damages, and costs of the lands descended; and it not being known what land descended, a writ was awarded to inquire what land descended; the court held this judgment erroneous, because by law the judgment ought to be general, which cannot be altered without the plaintiff's consent, and that did not appear here.

2 Roll. Abr. 71; Allen and Holden, adjudged, Trin. 1651; Sty. 287, S. C.

So, in an action of debt against an heir, if he pleads *riens per descent*, which is found against him; and it is further found by the jury, that he had certain lands by descent, upon which judgment is given that the plaintiff shall recover his debt, damages, and costs of the lands descended; this is an erroneous judgment, because it ought to have been general: also, it is said, that upon this issue they could not inquire of the assets descended.

2 Roll. Abr. 71; Pash. 1652, Snelgrave v. Bolvill. β There can be no judgment *quando acciderunt* against heirs. Monroe's executors v. Wilson, 6 Monroe, 124; 7 Monroe, 421. β

But, if in a writ of annuity the plaintiff declares for the arrearages, &c., against the heir, upon the grant of his ancestor, and the heir pleads that it is not the deed of his ancestor, which is found against him; in this case the judgment may be special, without the consent of the plaintiff; for being in the case of an annuity, which is always executory, it is at least in the election of the plaintiff to have execution of all the lands descended; whereas on a general judgment he can only have a moiety of all the heir's land in execution: also, in this case, the entering of a special judgment is for the heir's advantage, and therefore he cannot assign it for error.

Frank v. Stukely, 2 Roll. Abr. 71; Clotworthy v. Clotworthy, Cro. Car. 436.

Also, if upon pleading *riens per descent* it be found against the heir, or if he confess the action without setting forth the assets, or if there be a general judgment; upon these, or upon a *non sum informatus, nihil*

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*dictit*, &c., against him, the execution may be general of a moiety of all the lands of the heir.

2 Roll. Abr. 71.

But, if in an action of debt brought against the heir, the defendant acknowledge the action, and show in certainty the assets, upon which there is a judgment that the plaintiff shall recover, the debt to be levied of the assets descended; here the plaintiff shall have execution to levy the debt of all the land descended, and not to have a moiety only, as on an *elegit*.

2 Roll. Abr. 71.

Also, in case of a general judgment against the heir, although the plaintiff may have execution by *elegit* of a moiety of all the heir's lands; yet may he also at his election surmise that the heir hath such and such land by descent, and pray execution thereof; for were it otherwise, the plaintiff might be a loser by this general judgment, in which he is only entitled to a moiety of the land, inasmuch as the heir might not have any other lands, except those descended.

2 Roll. Abr. 71, 72.

β When the heir intends to rely upon the fact that nothing has descended to him, or that he has insufficient assets, he must plead it, or give notice of this matter specially, he cannot show it upon the general issue.

Vandusen v. Bower, 6 Cowen, 50. See Fisher's heirs v. Kay, 2 Bibb, 434.

When an heir is sued on the bond of his ancestor, and the issue is found against him, this is not such a false plea as to render him liable *de bonis propriis*.

Jackson *ex dem.* Carman v. Rosevelt, 13 Johns. 97.g

## 2. Where by his Promise to pay or discharge the Debt of his Ancestor.

If a man binds himself and his heirs in an obligation, and dies, and after the obligee sues the heir upon the obligation, who had no assets descended to him; and the heir says to him, that, if he will not sue him, then he will pay him the money; this is no consideration so as to maintain an action, because he was not chargeable (a) without assets.(b)

Lord Gray's case, 1 Roll. Abr. 28; 3 Leon. 67, 68; 4 Leon. 6, S. P. *Per curiam*. (a) But it is held, that in *assumpsit* against an executor on his promise it is not necessary to allege the assets, and that forbearance is a good consideration. *Vide tit. Executors and Administrators*, letter (M).—And *note*, by the statute of frauds, 29 Car. 2, c. 3, § 4, the promise must be in writing. (b) || It should seem, says Mr. Serjeant Williams, that this case would not now be so determined; for in the case of Barber v. Fox, *infra*, it appears that the judgment there was founded upon the want of alleging in the declaration, that the ancestor had bound himself and his heirs; and if the heir had been liable, it seems to follow that forbearance would have been adjudged a sufficient consideration to support the promise, without regarding whether he had assets or not at the time. And in this case of Lord Gray, if the defendant had not any assets, he ought to have pleaded it to the action and the bond: but, if instead of so doing, he desires the obligee to forbear his suit, and in consideration thereof promises payment, that appears to be a sufficient consideration: for though the forbearance may be of no benefit to the defendant, it might have been attended with a loss to the plaintiff not to proceed in his suit. 2 Saund. 137 a.||

So, in an *assumpsit* against an heir upon such a promise, it must be expressly shown that the heir was bound, else it shall not be intended, though after a verdict.

Barber v. Fox, 2 Saund. 136; 1 Vent. 159, S. C.; 2 Keb. 811, 836, S. C.; Hunt and Swain, Sid. 248; Sir T. Raym. 127, S. C.; 1 Lev. 165, S. C.; 1 Keb. 890, S. C.



## (I) What shall be Assets in his Hands.

adjudged.—And Keeling said, to charge an executor upon his promise you need not say assets, (though without them he shall not be bound,) because we will intend assets; but we cannot intend the heir was bound, but in this case must look upon him as a mere stranger.

But in such a case where the plaintiff declared, that the defendant, in consideration the plaintiff would deliver the bond to him, and discharge the debt, promised, &c., it was holden a good declaration, and that it should be intended he was liable, or at least, that the discharge should be made to him who was so.

Anon. Sid. 31. || This case is stated shortly, and will be found not to the present purpose. It was as follows: A father being indebted to J S in 100*l.* by bond, made a *fraudulent* deed, and thereby gave all his goods to his son, and died; and upon a conversation had concerning the fraudulent deed, the son promised J S in consideration he would deliver the bond to him, and make an acquittance and discharge to him of the debt, to pay him the 100*l.*; and an action having been brought thereon, and a verdict for the plaintiff, it was moved in arrest of judgment, that the consideration was not good, because it did not appear that the son was liable to the payment of the debt either as heir, or executor or administrator, or as executor of his own wrong; and therefore delivering the bond, or making the acquittance or discharge to him was not good. But it was answered and resolved, that the consideration was good; and it should be intended that he was liable, or at least that the discharge was made to the party who was liable; for the plaintiff promised to discharge the debt, and that should be intended to be made to the party who was liable to the payment of it, else it would be no discharge.—If this was in truth a fraudulent deed of gift of the goods by the father to the son, then it seems to follow, that the son was, after his father's death, liable to the payment of the debt, at least to the extent of the value of the goods, as *executor of his own wrong*, and therefore the delivering of the bond to him, and giving him an acquittance, appears to be a sufficient consideration to support the promise. The defendant was not charged as heir.||

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WHEREVER the ancestor binds himself and his heirs, all his lands of (a) freehold, which descend in (b) fee-simple, are assets by descent, and shall be liable, as far as they extend, to answer the ancestor's obligations.

Vide Bro. tit. *Assets*; Fit. tit. *Assets*; Roll. Abr. 269, tit. *Assets*. (a) But if a copy-hold descends to an heir, this shall not be assets, because it is an inheritance created by custom, and the common law directs the descent; but not that it shall have any other collateral qualities which do not concern such descent, and which other inheritances at common law have. 4 Co. 22 a.—But lands by descent in ancient demesne shall be assets. 7 H. 4, 14; Bro. tit. *Assets*, 11.—So, an advowson is assets, and may be extended at the rate of a shilling for every mark of the yearly value of the living. Co. Lit. 374 b; Robinson v. Tonge, 3 Br. P. C. 556; 3 P. Wms. 401; 2 Str. 879; Westfaling v. Westfaling, 3 Atk. 460; Ripley v. Waterworth, 7 Ves. 447. (b) Must be lands in fee-simple. 42 E. 3, 10 b.—For what shall be assets to make a lineal warranty a bar to an estate-tail, vide Co. Lit. 394 b; 2 Inst. 293; Kelw. 104 b, 124; 2 Roll. Abr. 774.

A reversion after a lease for years made by the ancestor is present assets, (c) so that the heir cannot plead *riens per descent* in delay of execution of the rent and reversion, (d) though the plaintiff cannot have benefit of the reversion till the lease be determined.

Salk. 354; 7 Mod. 72; 2 Ld. Raym. 783; 2 Mod. 50, 51; Ld. Raym. 53; Hern. Plead. 320. (c) In debt against the heir if he pleads *riens per descent*, the plaintiff may have judgment presently, and *scire facias* when assets descend. 8 Co. 134, in Mary Shepley's case, which point is held to be law; likewise in case of an executor, in Hob. 199, Vent. 94, 95; Sid. 448, contrary to the case of Dorchester and Webb. Cro. Car. —So, in a *warrantia chartæ* against an heir, who pleads *riens per descent*, or that the plaintiff is not impleaded, the plaintiff may pray judgment presently, F. N. B. 134; 8 Co. 134; Vent. 94, and Hob. 199, S. P.; and that the same may be done in the case of an executor; but, if the plaintiff will proceed to prove assets presently, and that

## (I) What shall be Assets in his Hands.

be found against him, he shall be barred for ever; and yet there was a debt due, and that in effect confessed. Hob. 199. (d) Where a man obtains a judgment against an heir who has a reversion in fee descended to him, the judgment is only of assets *quando acciderint*, and the creditor cannot by a bill in equity compel the heir to sell the reversion, but must expect until it falls. 2 Vern. 134; Fortrey v. Fortrey.

So, a reversion expectant upon the determination of an estate for life is *quasi* assets, and ought to be pleaded specially by the heir, and the plaintiff in such case may take judgment of it *cum acciderit*.

Carth. 129, *per* Holt, Rooke v. Clealand; 1 Lutw. 503, S. P.; 1 Lord. Raym. 53, S. C.

But a reversion in fee expectant upon an estate-tail is not assets, because it lies in the will of the tenant in tail to dock and bar it at his pleasure.

6 Co. 58; Roll. Abr. 269; 2 Roll. Rep. 129, S. P.; 3 Lev. 287; 3 Mod. 257; Carth. 129, S. P. agreed, and that it shall not charge the heir upon the general issue, *riens per descent*.—But after the tail is spent, it is assets. 3 Mod. 257. [That such a reversion is assets for the debt of the first person who was in possession, and who created the reversion, hath been expressly determined by Lord Hardwicke in *Kinaston v. Clarke*, 2 Atk. 204; but whether it be so for the debt of any of the intermediate takers, is a point which hath lately been much agitated, but hath received no decision. *Tweeddale v. Coventry*, 1 Br. Ch. Rep. 240; *Arundel v. Knight*, 1787, *Ibid.* 260. The case of *Smith v. Parker*, 2 Bl. Rep. 1230, purports to have decided that a reversion is assets. In that case, which was debt upon bond against the heirs of the obligor, Edward Perrot devised an estate to his brother Charles Perrot for life, remainder to his brother Robert Perrot for life, and his first and other sons in tail, remainder to trustees for thirty years, remainder to Edward John Perrot and his first and other sons in tail, remainder to William Perrot for life and his first and other sons in tail-male, remainder to Benjamin Perrot for life and his first and other sons in tail-male, remainder to the testator's right heirs. On the testator's death Charles entered, and died without issue. Robert died without issue before the testator. Edward John entered, and whilst in possession made the bond in question, and died without issue. William entered, and died without issue. And on his death, Benjamin being dead without issue, and all the said persons having died intestate, the estate came into possession of the defendants, who were heirs at law both of the testator and of Edward John the obligor, which Edward John was also, whilst in possession of the estate, the heir at law of the testator.—In this case, however, Lord Thurlow observes in *Tweeddale v. Coventry*, the contingent uses never came into possession, so that it was not a reversion after an estate tail, but after an estate for life only. See the case of *Giffard v. Barber*, Vin. Abr. tit. *Charge*, A. pl. 17, where Lord Hardwicke is reported to have said, that the reversion would not be liable to a bond of an intermediate taker, unless the estate came as assets by descent to the very heir of such person; though it would be to a judgment, because that attaches on the land.]—|| The authority of the above case of *Smith v. Parker* has since been denied by the Court of Common Pleas, in the Case of *Doe v. Huttor*, 3 Bos. & Pull. 643, 648, 651.]

If A hath issue B and C, and conveys lands to the use of himself for life, the remainder to B in tail, the remainder to his own right heirs, and A dies, and the reversion descends to B his son, and B dies seised, and the reversion descends to his son, who dies without issue, so that the tail is spent, and C enters, these lands shall be assets to answer the debt of his father.

Kellow v. Rowden. Carth. 127; 3 Lev. 286, S. C.; 3 Mod. 253, S. C.; 1 Show. 244, S. C.

The lands, as hath been observed, must *descend* to the heir; and therefore it was formerly holden, that if he took by purchase, as if the testator devised them to him paying so much, or if he devised lands to one or two, and his heir at law jointly, that those lands were not assets; but, if he devised one part to A, and another to B, another to his heir at law, this third part was assets.

Cro. Eliz. 431; 2 Mod. 286.

By the statute of frauds and perjuries it is enacted, that if lands come to

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the heir by reason of a special occupancy, they shall be chargeable in his hands as assets by descent, as in case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

It was not assets before the statute. 10 Co. 98 a. [An estate *pur autre vie* limited to heirs is within the statute of fraudulent devises, 3 & 4 W. & M. c. 14, and liable to specialty debts. *Westfaling v. Westfaling*, 3 Atk. 460; *Marwood v. Turner*, 3 P. Wms. 164.]

Also, by the said statute, § 10 & 11, where lands are settled in trust, and descend in fee to the heir of *cestui que trust*, the same shall be assets in the same manner as lands in possession, but the heir shall not, by reason of any plea or other matter, be chargeable to pay the condemnation out of his own estate.

Vide 2 Vern. 248.

An equity of redemption of an inheritance is assets, for the heir having a right in (a) equity, that ought in equity to be liable to satisfy a bond debt.

4 Chan. Ca. 148. (a) But the equity of redemption of a mortgage that is forfeited is not assets at law, for at law there is no redemption. 2 Vern. 61.—And there it made a *quære*, whether an heir being creditor by bond or judgment may not retain, the reason being the same in the case of an heir as it is of an executor, for neither can sue himself. See *Hopton v. Dryden*, Pr. Ch. 179.

Tenant in tail suffers a recovery to let in a mortgage of 500 years, and then limits the land to the old uses, and makes his will, and devises all his lands for the payment of his debts; the redemption was limited to him, his heirs, and assigns; and the court thought that the equity of redemption of this mortgage should be assets to satisfy creditors, or a subsequent grantee of an annuity.

*Fosset v. Austin*, Pr. Ch. 39.

A right without any estate in (b) possession, reversion or remainder, is not assets till it be recovered and reduced into possession.

6 Co. 58. (b) If a rent-seek descends to an heir, it is not assets till he hath gained seisin. 6 Co. 58 b.—But if lands descend to an heir, they are assets before entry, for he may enter when he will. 42 E. 3, 10 b; Roll. Abr. 269.

|| A power not executed is not assets for the payment of debts.

*Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206.||

β At law, the heir is entitled to the possession of the estate until a judgment against him; and, in equity, against a creditor not having a specific lien, he is entitled until a decree.

*Harrison v. Wood*, 1 Dev. & Bat. Eq. 439; *Trent v. Trent*, Gilm. 174; *Adams v. Adams*, 4 Watts, 169; *Goodrich v. Thompson*, 4 Day's Cas. 215.

An administrator who collects the rents and profits of the real estate of the intestate, holds them as trustee for the heirs and not for the creditors.

*McCoy v. Scott*, 2 Rawle, 222. See *Goodrich v. Thompson*, 4 Day, 215; *Gibson v. Farley*, 16 Mass. 280.

When the heir sells lands descended to him, he is liable to pay the specialty debts of his ancestor, so far as the proceeds extend.

*Hamilton v. Haynes*, Cam. & Nor. 413. See *James v. Bremer*, 2 Desaus. 560; *Jackson v. Bradford*, 4 Wend. 619; *Covell v. Weston*, 20 Johns. 414; *Coxe's heirs v. Strobe*, 2 Bibb, 378; *Ellis v. Gosney's heirs*, 1 J. J. Marsh. 349.

When the heir is an alien, and incapable of inheriting the real estate,

(A) Of Heresy.

the court will not on his petition order the real estate to be sold for the payment of debts, in order to let him enjoy the personal estate.

Trezevant v. Howard, 3 Desaus. 87. See Haleyburton v. Kershaw, 3 Desaus. 105.

If an heir pay the debts of the intestate to the value of the lands descended, he shall be deemed a purchaser, and they shall not be affected by other debts.

Gibson v. Williams, 2 Hay. 281.g

Where the personal estate only shall be applied in discharge of debts, *vide supra*.

## HERESY, AND OFFENCES AGAINST RELIGION.

(A) Of Heresy: And herein,

1. *What it is.*
2. *By whom it is cognisable.*
3. *How punished.*

(B) Of Witchcraft, and how punished.

(C) Of Offences against Religion as punishable by the Common Law.

(D) Of Offences by Statute against Religion: And herein,

1. *Of the Offence of profaning the Lord's Day.*
2. *Of the Offence of Swearing.*
3. *Of the Offence of Drunkenness.*
4. *Of the Offence of reviling the Sacrament.*
5. *Of Offences against the Common Prayer.*
6. *Of the Offence of teaching School without conforming to the Church.*
7. *Of the Offence in not coming to Church: And herein:*
  1. What Forfeitures of Money, Lands, or Goods such Offenders incur.
  2. In what manner they are to be proceeded against for those Forfeitures.
  3. What other inconveniences they are subject to.
  4. By what Means they may be discharged.
  5. How far a Person is punishable for suffering such Absence in others.
8. *Of Offences against the Established Church by Protestant Dissenters.*

*Of the Offence of professing or encouraging the Popish Religion, vide tit. Popish Recusants.*

*Of the Offence of holding an Office without conforming to the Established Religion, vide tit. Office.*

(A) Of Heresy: And herein,

1. *What it is.*

HERESY, (a) among protestants, is said to be a false opinion repugnant to some point of doctrine clearly revealed in Scripture, and either absolutely essential to the Christian faith, or at least of most high importance.

Hawk. P. C. c. 2. ||According to Bishop Grosseteste, *Hæresis est sententia humano*

## (A) Of Heresy.

*sensu electa, scripturæ sacræ contraria, palam edocta, pertinaciter defensa. Hæresis enim Græcè est electio Latine.* Matth. Westmonast. ann. 1253. Pegg's Life of Grosseteste, p. 204. Sir M. Hale does not give this as his own definition of heresy, as Sir Wm. Blackstone says, in 4 Comm. 44; but merely refers to it as, though somewhat general, more reasonable than that in Lindwood. || (a) That anciently under the general name of heresy there have been comprehended three sorts of crimes: 1. Apostasy, when a Christian did apostatize to Paganism or Judaism. 2. Witchcraft. 3. For mal heresy, which seems to be an apostacy from the established religion; for which, and the several ways of determining, punishing, and the difference between the civil and imperial laws, popish canons, and the laws of England concerning heresy, vide a large account in Hal. Hist. P. C. 383 to 410.

It seems (a) difficult precisely to determine what errors shall amount to heresy, and what not; but the statute 1 Eliz. c. 1, which erected the high commission court, having restrained it to such as have been adjudged to be heresy by the authority of the canonical Scriptures, or by some of the first four general councils, or by any other general council wherein the same was declared heresy by the express and plain words of the canonical Scriptures, or such as shall be adjudged or determined to be heresy by the high court of parliament, with the assent of the convocation; these rules are at present generally thought the best directions concerning this matter.

Hawk. P. C. c. 2. (a) And it is said by my Lord Hale, that the papal canonists have by ample and general terms extended heresy so far, and left it so much in the discretion of the ordinary to determine it, that there is scarce any the smallest deviation from them but may be reduced to heresy, according to the great generality and latitude of their definitions and descriptions; from whence he observes, how miserable the servitude of Christians was under the papal hierarchy, who used so arbitrary and unlimited power to determine what they pleased to be heresy, and then, *omni appellatione postposita*, subjecting men's lives to their sentence. Hal. Hist. P. C. 383, 389. || It hath been objected to the laws now in force against heresy, that the crime is not defined in them with sufficient precision; but this, says Dr. Furneaux, seems to be no small security, in connection with the lenity of the times, that those laws will not be executed; on account of the difficulty of defining what is heresy, and perhaps of finding a jury that will be forward in defining it, where the law hath left it doubtful and undefined. What therefore is imagined a defect in the law, which ought to be supplied, appears to be a circumstance very favourable to the secure enjoyment of the rights of conscience. See his second Letter to Dr. Blackstone. ||

## 2. By whom it is cognisable.

According to the common and imperial law, and generally by other laws in kingdoms and states where the canon law obtained, the ecclesiastical judge was the judge of heresies, and hereby he obtained a large jurisdiction touching them.

Hal. Hist. P. C. 384.

Hence it is, that, by the common law with us, the convocation of the clergy, or provincial synod, (b) might and frequently did proceed to the sentencing of heretics, and, when convicted, left them to the secular power, whereupon the writ *de hæretico comburendo* might issue.

Bro. tit. *Heresy*, 2 Roll. Abr. 226. (b) || Upon the revival of the Arian controversy by Mr. Whiston, doubts were entertained, whether the convocation could, in the first instance, proceed against a person for heresy; and the queen, in consequence of an address from the upper House of Convocation, took the opinion of the judges. Four of the judges were clearly of opinion, that the convocation had no jurisdiction, and maintained it from the statutes made at the Reformation. The remaining eight, with the attorney and solicitor general, gave their opinion in favour of the jurisdiction, but brought no express law nor precedent to support it; they only observed, that the law-books spoke of the convocation as having such jurisdiction, and they did not see that it was ever taken from them. They were also of opinion that an appeal lay from the sentence of convocation to the crown; but they reserved to themselves a power to change their mind, in case, upon an argument that might be made for a prohibition, they should see cause for it. Burnet's Own Times, vol. 2, p. 347. ||

## (A) Of Heresy.

Also, it is agreed, that every bishop may convict persons of heresy within his own diocese, and proceed by church censures against those who shall be convicted; but it is said, that no spiritual judge, who is not a bishop, hath this power; and it has been (a) questioned, whether a conviction before the ordinary was a sufficient foundation whereon to ground the writ *de hæretico comburendo*, as it is agreed that a conviction before the convocation was.

F. N. B. 269; 12 Co. 56, 57; 3 Inst. 40; Gibs. Codex. 401; Hawk. P. C. 4; State Trials, vol. 2, 275. (a) Ld. C. J. Hale seems to be of opinion, that if the diocesan convict a man of heresy, and either upon his refusal to abjure, or upon a relapse, decree him to be delivered over to the secular power; and this be signified under the seal of the ordinary into Chancery, the king might thereupon by special warrant command a writ *de hæretico comburendo* to issue, though this were a matter that lay in his discretion to grant, suspend, or refuse, as the case might be circumstanced. Hal. Hist. P. C. 392.

But it seems agreed, that regularly the temporal courts have no consueance of heresy, either to determine what it is, or to punish the heretic as such, but only as a disturber of the public peace; and that therefore, if a man be proceeded against as a heretic in the spiritual court *pro salute animæ*, and think himself aggrieved, his proper remedy is to bring his appeal to a higher ecclesiastical court, and not to move for a prohibition from a temporal one.

27 H. 8, 14, b; 5 Co. 58; Hob. 236.

Yet a temporal judge may incidentally take knowledge, whether a tenet be heretical or not; as, where one was committed by force of 2 H. 4, c. 5, for saying that he was not bound by the law of God to pay tithes, to the curate; another for saying, that though he was excommunicate before men, yet he was not so before God; the temporal courts on a *habeas corpus* in the first case, and an action of false imprisonment in the other, adjudged neither of the points to be heresy within that statute, for the king's courts will examine all things which are ordained by statute.

3 Inst. 42; Roll. Rep. 110; 2 Buls. 300.

Also, in a *quare impedit*, if the bishop plead that he refused the clerk for heresy, it seems that he must set forth the particular point, that it may appear to be heretical to the court wherein the action is brought, which having consueance of the original cause, must by consequence have a power in all incidental matters necessary for the determination of it, and without knowing the very point alleged against the clerk, will not be able to give directions concerning it to the jury, who (if the party be dead) are to try the truth of the allegation.

5 Co. 58; And. 191; 3 Leon. 199; 3 Lev. 314.

## 3. How punished.

By the common law, one convicted of heresy, and refusing to abjure it, or falling into it again after he had abjured it, might be burnt by force of the writ *de hæretico comburendo*; (b) which issued out of Chancery upon a certificate of such conviction; but he forfeited neither lands nor goods, because the proceedings against him were only *pro salute animæ*.

F. N. B. 269; 3 Inst. 43; Doctor and Student, lib. 2, c. 29; Hawk. P. C. c. 2. (b) || Walsingham, in relating the burning of a poor Lollard for heresy, in 1410, tells us, that the sufferer was shut up in a cask. See his *Historia Brevis*, p. 421. This mode of executing the punishment is not, it seems, described by any other writer. Henry's Hist. vol. 10, p. 9. The *Cathari*, as they were called, a colony of Germans, to the number of thirty, of both sexes, who made their appearance in this country in the time of our second Henry, and were pronounced heretics by a synod of bishops at Oxford, were not burnt, but, by order of the king, were branded in the forehead, strip-

(B) Of Witchcraft, and how punished.

ped to the waist, and whipped out of the city. The punishment of heresy by burning had been forbidden by Henry in his continental dominions. Hoved. 352.||

But at this day the writ *de hæretico comburendo* is abolished by 29 Car. 2, c. 9, and all the old statutes, that gave a power to arrest or imprison persons for heresy, or introduced any forfeiture on that account, are repealed; yet, by the common law, an obstinate heretic being excommunicate, is still liable to be imprisoned by force of the writ *de excommunicato capiendo*, till he make satisfaction to the church.

12 Co. 44; Hawk. P. C. c. 2.

Also, by the 9 & 10 W. 2, c. 32, it is enacted, "That if any person, having been educated in or having made profession of the Christian religion within this realm, shall be convicted in any of the courts of Westminster, or at the assizes, of denying any of the persons in the Holy Trinity to be God, or maintaining that there are more gods than one, or of denying the truth of the Christian religion, or the divine authority of the Holy Scriptures, he shall for the first offence be adjudged incapable of any office, and for the second shall be disabled to sue any action, or to be guardian, executor, or administrator, or to take by any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical for ever, and shall also suffer imprisonment for three years, without bail or mainprize, from the time of such conviction."

[But it is provided, that if within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.]

|| By 1 W. & M. sess. 1, c. 18, which was passed to exempt their majesties' protestant subjects, dissenting from the church of England, from the penalties of certain laws, it is provided by § 17, that neither that act, nor any thing therein contained, shall extend, or be construed to extend, to give any ease, benefit, or advantage to any person that shall deny, in his preaching or writing, the doctrine of the blessed Trinity, as it is declared in the thirty-nine articles of religion.

But by 53 G. 3, c. 160, extended to Ireland by 57 G. 3, c. 70, the above provisions in the acts of 1 W. & M. c. 18, and 9 & 10 W. 3, c. 32, so far as they relate to the denial of the Holy Trinity are repealed, as is also a similar provision in an Irish act of 6 G. 1.

And the same act of 53 G. 3 repeals two Scottish acts, the one passed in the first parliament of Charles 2, and the other in the first parliament of W. 3, which inflicted the punishment of death on persons denying, or impugning the doctrine of the Trinity.

But, if the public denial of the doctrine of the Trinity were an offence at common law, it still remains so, notwithstanding the act of 53 Geo. 3, for it was not the intent of the legislature in the passing of that act, to alter, or in any manner affect the common law in this point, but merely to take away the penalties inflicted on the offence by the acts of King William.

Attorney-General v. Pearson, 3 Mer. 353.

A court of equity could no more carry into effect a trust for promoting Unitarianism, than it could carry into effect a trust for the preaching of Judaism.

Per Lord Eldon, Ibid. 393; Da Costa v. Depaz, Ambler 228, 712; 7 Ves. 76.||

(B) Of Witchcraft, and how punished.

WITCHCRAFT, or *sortilegium*, was by the ancient laws of England of (a)

## (C) Of Offences against Religion.

ecclesiastical conusance, and upon conviction thereof without abjuration, or relapse after abjuration, was punishable with death by the writ *de hæretico comburendo*.(b)

3 Inst. 44; Cro. Eliz. 571; Hawk. P. C. c. 2; Hal. Hist. P. C. 383. (a) Also it is said, that offenders of this kind may be condemned to the pillory, &c., upon an indictment at common law. Hawk. P. C. c. 2. (b) || It was punished in the same manner as heresy; because witchcraft was considered as a branch of heresy. The president Montesquieu ranks them also both together, Sp. L. b. 12, c. 5, but with a very different view; laying it down as an important maxim, that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals, and the constant practice of every duty in life, are not a sufficient security against the suspicion of these crimes. 4 Bl. Comm. 61.||

Also, by an act of parliament, 1 Ja. c. 1, 12, it was made felony without benefit of clergy, (a) to use any invocation or conjuration of any evil spirit, or to consult or covenant with any evil spirit, or to exercise any witchcraft, enchantment, charm, or sorcery, whereby any person shall be killed, destroyed, consumed, or lamed in his body, &c.

(a) It was first made so by stat. 33 H. 8, repealed by stat. 1 E. 6, c. 12. It was again made so by stat. 5 Eliz. c. 16, which was repealed by this act of 1 Ja., and this clause of repeal in the st. of Ja. is expressly saved by the st. of 9 Geo. 2, which repeals the st. of Ja.||

But by the 9 Geo. 2, c. 5, the above-mentioned statute is repealed; and it is thereby enacted, § 3, "That no prosecution, suit, or proceeding, shall be commenced or carried on against any person or persons for witchcraft, sorcery, enchantment, or conjuration, or for charging another with any such offence in any court whatsoever in Great Britain."

But for the more effectual preventing and punishing of any pretences to such arts or powers as are before-mentioned, whereby ignorant persons are frequently deluded, and defrauded, it is enacted by the said statute, 9 Geo. 2, c. 5, § 4, "That if any person shall pretend to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertake to tell fortunes, or pretend, from his or her skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels, supposed to have been stolen or lost, may be found; every person so offending, being thereof lawfully convicted on indictment or information in that part of Great Britain called England, or on indictment or libel in that part of Great Britain called Scotland, shall for every such offence suffer imprisonment by the space of one whole year, without bail or mainprize; and once in every quarter of the said year, in some market town of the proper county, upon the market day there, stand openly on the pillory by the space of one hour, and also shall (if the court, by which such judgment shall be given, shall think fit) be obliged to give sureties for his or her good behaviour, in such sum, and for such time, as the said court shall judge proper, according to the circumstances of the offence; and in such case shall be further imprisoned until such sureties be given."

See 17 G. 2, c. 5, § 2.

## (C) Of Offences against Religion, as punishable by the Common Law.

ALTHOUGH offences against religion are, strictly speaking, of ecclesiastical conusance, yet where a person, in maintenance of his errors, sets up conventicles, or raises factions, which may tend to the disturbance of the public peace; or where the errors are of such a nature as subvert all religion or morality, which are the foundation of government; they are punishable by



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the temporal judges with fine and imprisonment, and also such corporal infamous punishment as to the court in discretion shall seem meet, according to the heinousness of the crime *ne quid detrimenti respublica capiat*.

Hawk. P. C. c. 2, Fitzg. 65.

Such as all blasphemies against God, as denying his being or providence, and all contumelious reproaches of Jesus Christ.

Taylor's case, Vent, 293; 3 Keb. 607, 621. [Rex v. Woolston, 2 Str. 834; Fitzg. 64.]  $\beta$  11 S. & R. 394; 5 Binn. 555; 8 Johns. 291; 7 Dane's Ab. c. 219 a, 2, 19; 2 Swift's Syst. 321; Cooper's Law of Libel, 59, 114. Jeff. Rep. Appx. g

Also, all profane scoffing at the Holy Scriptures, or exposing any part thereof to contempt or ridicule.

Hawk. P. C. c. 2.

Impostors in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments, &c.

Hawk. P. C. c. 2.

All open lewdness grossly scandalous, such as was that of those persons who exposed themselves naked to the people in a balcony in Covent Garden, with most abominable circumstances.

Sid. 168; Keb. 620; 2 Str. 791.

Seditious words in derogation of the established religion are indictable (a), as tending to a breach of the peace; as these, "Your religion is a new religion, and preaching is but prattling, and prayer once a day is more edifying."

Fortesc. Rep. 95, 99; 2 Roll. Abr. 187; Hawk. P. C. c. 2. (a) But not before justices of the peace. Cro. Ja. 44.  $\beta$  The Constitution of the United States provides, Amendments, art. 1, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." g

|| A publication stating Jesus Christ to be an impostor, and a murderer, in principle, is a libel at common law. The 53 G. 3, c. 160, does not alter the common law, but only removes the penalties imposed on persons denying the Trinity, by 9 & 10 W. 3, c. 32, and extends to all such persons the benefits conferred on all other Protestant dissenters by 1 W. & M. st. 1, c. 18, (the toleration act.)

The King v. Waddington, 1 Barn. & C. 26. ||

## (D) Of Offences by Statute against Religion: And herein,

## 1. Of the Offence of profaning the Lord's Day.

|| By 1 Ja. 1, c. 22, § 28, "No cordwainer or shoemaker shall show, to intent to put to sale, any shoes, boots, buskins, startops, slippers, or pantouffles upon the Sunday, upon pain of forfeiture for every pair of shoes, boots, &c., made, sold, showed, or put to sale, contrary to the true meaning of this act, three-shillings and four pence, and the just and true value of the same."

By the 1 Car. 1, c. 1, it is enacted, That there shall be no assembly of people out of their own parishes on the Lord's day for any sport whatsoever, nor any bull-baiting, or bear-baiting, interludes, common plays, or other unlawful exercises and pastimes used by any persons within their own parishes, on pain that every offender shall forfeit 3s. 4d. to the use of the poor, &c.

By the 29 Car. 2, c. 7, it is enacted, "That all the laws enacted and in force, concerning the observation of the Lord's day, and repairing to the

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church thereon be carefully put in execution ; and that all persons shall every Lord's day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion publicly and privately ; and that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings, upon the Lord's day, or any part thereof (works of necessity and charity only excepted) ; and that every person being of the age of fourteen years, or upwards, offending in the premises, shall for every such offence forfeit the sum of 5s. ; and that no person or persons whatsoever shall publicly cry, show forth, or expose to sale any wares, merchandises, fruit, herbs, goods, or chattels whatsoever, upon the Lord's day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or showed forth, or exposed to sale.”(a)

(a) || To an indictment for exercising the trade of a butcher on a Sunday, it was objected, that it was not laid to be *contra formam statuti*, and this was no offence at common law : and on demurrer there was judgment for the defendant. *R. v. Brotherton*, 2 Str. 702. If this was no offence at common law, it would seem not to be indictable, because this statute, which creates the offence, has prescribed a particular specific mode of punishment. *R. v. Buck*, 1 Str. 769 ; *R. v. Wright*, 1 Burr. 543 ; *R. v. Robinson*, 2 Burr. 803. But *quæ* whether this was not an offence indictable at common law. At common law a sale upon the Lord's day was not considered as a sale in market overt to alter the property. *Wingate's Max.* 5, p. 6 ; 12 E. 4, 8 b. This statute, however, applies only to dealings in the course of trade, in the exercise of men's ordinary callings ; not to the private transactions of individuals. *Drury v. Defontaine*, 1 Taunt. 131. ||  $\beta$  In some of the states of the Union, owing to statutory provisions, contracts made on Sunday are void, 6 Watts, 231 ; *Leigh*, N. P. 14 ; 1 P. A. Brown, 171 ; but in general they are binding, although made on that day, if good in other respects. 1 *Crompt. & Jervis*, 130 ; *Wright's R.* 754 ; 10 Mass. 312 ; 1 *Cowen*, 76, n. See 13 Am. Jur. 378. g

And it is further enacted, § 2, “ That no drover, horsecourser, wagoner, butcher, higler, their or any of their servants, shall come into his or their inn or lodging upon the Lord's day, or any part thereof, upon pain that each and every such offender shall forfeit 20s. for every such offence ; and that no person or persons shall use, employ, or travel upon the Lord's day with any boat, wherry, lighter, or barge, except it be upon extraordinary occasion, to be allowed by some justice of the peace of the county, or head officer, or some justice of the peace of the city, borough, or town corporate, where the fact shall be committed : upon pain that every person so offending shall forfeit and lose the sum of five shillings for every such offence ; and that if any person offending in any of the premises shall be thereof convicted before any justice of the peace of the county, or the chief officer or officers, or any justice of the peace of or within any city, borough, or town corporate, where the said offence shall be committed, upon his or their view, or confession of the party, or proof of any one or more witnesses by oath, (which the said justice, chief officer or officers, are by this act authorized to administer,) the said justice, or chief officer or officers shall give warrant under his or their hand and seal to the constable or churchwardens of the parish or parishes, where such offence shall be committed, to seize the said goods cried, showed forth, or put to sale as aforesaid, and to sell the same, and to levy the said other forfeitures or penalties by way of distress and sale of the goods of every such offender distrained, rendering to the said offenders the overplus of the moneys raised thereby ; and in default of such distress, or in case of insufficiency or inability of the said offender to pay the said forfeitures or penalties, that then the party offending be set publicly in the stocks by the space of two hours : And all and singular the

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forfeitures or penalties aforesaid shall be employed and converted to the use of the poor of the parish where the said offences shall be committed; saving only that it shall and may be lawful to and for any such justice, mayor, or head officer or officers, out of the said forfeitures or penalties, to reward any person or persons that shall inform of any offence against this act, according to their discretions, so as such reward exceed not the third part of the forfeitures or penalties."

But by 11 & 12 W. 3, c. 21, forty watermen may be appointed by the Company of Watermen to ply on the river Thames.—And by the 9 Ann. c. 23, § 20, hackney-coachmen and chairmen are permitted to work within the bills of mortality on Sunday.—\*Mackerel may be sold on a Sunday, 10 & 11 W. 3, c. 24, § 14.

§ 3. "Provided, That nothing in this act contained shall extend to the prohibiting of dressing of meat in families, or dressing or selling of meat in inns, cook-shops, or victualling-houses, for such as otherwise cannot be provided, nor to the crying or selling of milk before nine of the clock in the morning, or after four of the clock in the afternoon."

[It having been determined that bakers who baked dinners on a Sunday were within the equity of this proviso, *R. v. Cox*, 2 Burr. 785; *R. v. Younger*, 5 T. R. 449; and it being found that the liberty given by this determination had been carried to a very unreasonable extent, particularly in the metropolis, it was enacted, by st. 34 G. 3, c. 61, "That no baker in London, or within 12 miles thereof, shall exercise his trade on a Sunday, under a penalty of ten shillings, except between nine o'clock in the forenoon and one o'clock in the afternoon, within which time he may sell bread, and bake meat, pudding, or pies only, so as the person requiring the baking thereof carry or send the same to and from the place where they are baked."]

§ 4. "Provided also, That no person shall be impeached, prosecuted, or molested for any offence before mentioned in this act, unless he or they be prosecuted for the same within ten days after the offence committed."

[Upon this act a person can be convicted in only one penalty upon the same day, *Crepps v. Durden*, Cowp. 640.]

§ 6. "Provided also, That no person or persons upon the Lord's day shall serve or execute, or cause to be served or executed, (a) any writ, process, (b) warrant, order, (c) judgment, or decree, (except in cases of treason, felony, or breach of the peace,) but that the service of every such writ, process, warrant, order, judgment, or decree shall be (d) void to all intents and purposes whatsoever; and the person or persons so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, process, warrant, order, judgment, or decree at all."

(a) It hath been holden that, notwithstanding this statute, a person may be taken on a Sunday upon a judge's warrant for escaping out of prison. *Parker v. Sir William More*, 6 Mod. 95; 2 Salk. 626; 2 Ld. Raym. 1028. [See too 5 Ann. c. 9, § 3. But in the case of a voluntary escape, the party cannot be retaken on a Sunday. *Featherstonehaugh v. Atkinson*, Barnes, 373; *Atkinson v. Jameson*, 5 T. R. 25.] A citation out of the spiritual court may be served on a Sunday, notwithstanding the act. *Alanson v. Brookbank*, 5 Mod. 449; Carth. 504. [But Comyns, Chief Baron, in abridging this case, says, that although a citation may be published on the church door on a Sunday, according to the usage of the spiritual court, yet it cannot be served on the person on that day. Com. Dig. tit. "Temps," (B). In the case of *Walgrave v. Taylor*, 1 Ld. Raym. 706; 12 Mod. 606, the above decision respecting the service of a citation on a Sunday is recognised as good law by Holt, C. J., and no notice is taken of the distinction made by the chief baron. So, a person may be arrested on a Sunday on the lord chancellor's warrant, on an order of commitment for contempt; for he is considered as in custody from the time of making the order, and the warrant is in nature of an escape warrant. Semb. 1 Atk. 55. So, a person may surrender voluntarily on a Sunday. Ibid. So, process on an indictment and an attachment for contempt may be served on a Sunday. Ibid. Anon. Willes, 459. But bail cannot take their principal on a

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Sunday, in order to surrender him. *Brookes v. Warren*, 2 Bl. Rep. 1273. Nor can a person be taken on a Sunday upon an attachment for non-performance of an award, *R. v. Myers*, 1 T. R. 265; or for non-payment of the forfeiture under a penal statute, *Ibid.*;] || or for non-payment of costs, *Hawkins v. Fackman, Jr.* T. Rep. 537; *R. v. Pickerill*, 4 T. R. 809; for the attachment in each of these cases is in the nature of a civil suit. Nor can a rule *nisi* for an attachment for non-payment of money pursuant to the master's *allocatur* be served on a Sunday. *M'Illeham v. Smith*, 8 T. R. 86. || An indictment cannot be taken, 2 Keb. 731; 1 Ventr. 107; 2 Saund. 290; [nor can a writ of inquiry be executed on a Sunday. *Fortesc.* 373; 1 Str. 387.] (b) || Service on a Sunday of notice of plea filed is void; for all notices on which rules are made are process in respect of the rule. *Roberts v. Monkhouse*, 8 East, 547. || (c) In *Salk*, 78, pl. 1, it is said, that the arrest is void, so that the party may have an action of false imprisonment for it.—And in 5 Mod. 95, it is said, that the court would not discharge the party on motion, but directed him to bring an action of false imprisonment.—And in 6 Mod. 95, it is said by Holt, C. J., that if the court will relieve from such an arrest, it must be by *audita querela*; for it being on a Sunday, is a fact traversable; but the other judges held, that it could be done on motion. 2 Ld. Raym. 1028. (d) || Service of process on a Sunday is absolutely avoided by the statute, and cannot be made good by the adverse party's consenting to wave any objection to it. *Taylor v. Phillips*, 3 East, 155. By the common law, *dies Dominicus non est juridicus*. No plea therefore shall be holden *quindena Pasche*, because it is always the Lord's day; but it shall be *crastino quindene Pasche*. F. N. B. 17 f. So, upon a fine levied with proclamations according to the statute of 4 H. 7, c. 24, if any of the proclamations are made on the Lord's day, all the proclamations are void, for the justices may not sit upon that day, being a day exempt from business by the common law for the solemnity of it, to the intent that all people may apply themselves that day to prayer and serving of God. *Finch's Law*, 7. But the fine itself remains good, as a fine without proclamations. *Fish v. Broket*, Plowd. 265. If a writ of *scire facias* out of the Common Pleas bear teste upon a Sunday, it is error, because that is not *dies juridicus in banco*. *Barrett v. Cleydon*, Dy. 168 a. || *β* See ante BAILIFF, A. g

|| By 13 G. 3, c. 80, § 6, "If any person or persons shall upon a Sunday, or on Christmas-day, in the day-time, knowingly and wilfully take, kill, and destroy any hare, pheasant, partridge, heath game, or moor game, or shall upon a Sunday, or Christmas-day, use any gun, dog, net, or engine, for taking, killing or destroying any hare, pheasant, partridge, moor game, or heath game, every such person, being convicted thereof in the manner and form prescribed by this act, shall be subject to the like forfeitures and penalties as are herein enacted to be inflicted for other offences against this act."

A horsedealer cannot maintain an action on a warranty of a horse bought by him on a Sunday, for he is exercising his calling contrary to 29 Car. 2, c. 7.

*Fennell v. Ridler*, 5 Barn. & C. 406.

If a person makes a contract with another on the Sabbath, the latter only being in the exercise of his worldly calling, but the former not knowing it, the contract is void, as being against the statute; but the innocent party may recover back money paid on it, for he is no party to the offence.

*Bloxsome v. Williams*, 3 Barn. & C. 232.

Neither of the statutes 3 Car. 1, c. 1, nor 29 Car. 2, c. 7, makes it illegal for stage-coaches to travel on the Lord's day, as they do not fall within the language of the acts.

*Sandiman v. Breach*, 7 Barn. & C. 96.

But the driver of a van is a "carrier" within the meaning of the 3 Car. 1, c. 4, and liable to be convicted in the penalty of twenty shillings for travelling on the Lord's day.

*Ex parte Middleton*, 3 Barn. & C. 164. ||

## (D) Of Offences by Statute against Religion.

2. *Of the Offence of Swearing.*

[By 19 Geo. 2, c. 21, "If any person shall profanely curse or swear, and be convicted on the oath of one witness, or by confession, or by the hearing of one magistrate, he shall forfeit, 1. Every day labourer, common soldier, sailor, or seaman, 1s. 2. Every other person under the degree of a gentleman, 2s. 3. Every person of or above the degree of a gentleman, 5s. On a second conviction double, and on every other treble the sum first forfeited, for the use of the poor of the parish where the offence shall be committed; and in default of immediate payment, or giving immediate security for payment, shall, if not a common soldier, sailor, or seaman, be confined to hard labour for ten days; but if a common soldier, sailor, or seaman, in actual service, shall be set in the stocks for one hour for any single offence, and for two hours for any greater number at the same time. All charges of the information and conviction are to be borne by the offender; but if he be not able, or obstinately refuse to defray them, he is to be committed to the house of correction for six days over and above the time limited in case of non-payment of the penalties. The justice neglecting his duty forfeits 5*l.*, and the constable 40*s.* The act is to be read quarterly in all churches, &c., under a penalty of 5*l.*; and all prosecutions under it are to be made within eight days next after the offence committed." By 22 Geo. 2, c. 33, all flag-officers, and persons belonging to his majesty's fleet, are punishable for this offence at the discretion of a court-martial.

This act repeals 21 Ja. 1, c. 10, and 6 & 7 W. 3, c. 11. In a conviction of this kind, the oaths and curses must be set forth; for what is a profane oath or curse is matter of law, and ought not to be left to the judgment of the witness. *R. v. Sparling*, 1 Str. 497; 8 Mod. 58; *R. v. Popplewell*, 2 Str. 686; *R. v. Chaveney*, 2 Lord Raym. 1368. But a conviction for swearing the same oath several times need not repeat the oath. *R. v. Roberts*, 1 Str. 608; 2 Ld. Raym. 1376, S. P. A conviction of a person as being of a higher degree, must negative his being of a lower degree.] ||*R. v. Tucke*, 3 Ld. Raym. 1386; 8 Mod. 366, S. C. This act of 19 G. 2, c. 21, § 8, gives a summary form of conviction.||

3. *Of the Offence of Drunkenness.*

By the statutes 4 Ja. 1, c. 5, and 21 Ja. 1, c. 7, all persons whatsoever convicted of drunkenness by the view of a justice, oath of one witness, or party's confession, shall forfeit five shillings to the use of the poor, to be levied by distress and sale of goods; and for want of a distress, shall be set in the stocks six hours. [And by the above statute of 22 Geo. 2, c. 33, this offence is punishable in persons belonging to the fleet in like manner as the preceding offence.]

4. *Of the Offence of Reviling the Sacrament.*

By the 1 E. 6, c. 1, reviling the sacrament is an offence for which the party shall be imprisoned, fined, and ransomed; and this statute, which was repealed, 1 Mar. c. 2, is again revived by 1 Eliz. c. 1, and is now in force.

5. *Of Offences against the Common Prayer.*

By the 2 & 3 Ed. 6, c. 1, and 6 Ed. 6, c. 1, (which were repealed by 1 Ma. sess. 2, c. 2, and revived by 1 Eliz. c. 2,) the Common Prayer book was first established, under severe penalties; but those penalties being repealed and enlarged by 1 Eliz. c. 2, and 13 & 14 Car. 2, c. 4, which enacts the use of the same Common Prayer, with some alterations, those statutes of Ed. 6 seem at this day to be of little use.

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|| By 1 Eliz. c. 2, § 4, "If any manner of parson, vicar, or other whatsoever minister, that ought or should sing or say common prayer mentioned in the book of Common Prayer, or minister the sacraments, refuse to use the said common prayers, or to minister the sacraments in such cathedral or parish church, or other place as he should use to minister the same, in such order and form as they be mentioned and set forth in the said book; or shall, wilfully or obstinately standing in the same, use any other rite, ceremony, order, form or manner of celebrating of the Lord's supper, openly or privily, or matins, even-song, administration of the sacraments, or other open prayers, than is mentioned and set forth in the said book, (open prayer in and throughout this act, is meant that prayer which is for others to come unto, or hear either in common churches, or private chapels, or oratories, commonly called the service of the church,) or shall preach, declare, or speak any thing in the derogation or depraving of the said book, or any thing therein contained, or of any part thereof, and shall be thereof lawfully convicted, according to the laws of this realm, by verdict of twelve men, or by his own confession, or by the notorious evidence of the fact, shall lose and forfeit to the queen's highness, her heirs and successors, for his first offence, the profits of all his spiritual benefices or promotions coming and arising in one whole year next after his conviction; and also the person so convicted, shall, for the same offence, suffer imprisonment for the space of six months, without bail or mainprize."

§ 5. "If any such person once convict of any offence concerning the premises, shall, after his first conviction, oftsoons offend, and be thereof in form aforesaid lawfully convict, then the same person shall for his second offence suffer imprisonment by the space of one whole year, and also shall therefore be deprived, *ipso facto*, of all his spiritual promotions; and it shall be lawful to all patrons or donors of all and singular the same spiritual promotions, or any of them, to present or collate to the same, as though the person or persons so offending were dead."

§ 6. "And if any such person, or persons, after he shall be twice convicted in form aforesaid, shall offend against any of the premises the third time, and shall be thereof in form aforesaid lawfully convicted, then the person so offending, and convicted the third time, shall be deprived, *ipso facto*, of all his spiritual promotions, and also shall suffer imprisonment during his life."

§ 7. "And if the person that shall offend, and be convicted in form aforesaid of any of the premises, shall not be beneficed, nor have any spiritual promotions, then the same person so offending and convict, shall for the first offence suffer imprisonment during one whole year next after his said conviction, without bail or mainprize."

§ 8. "And if any such person not having any spiritual promotion, after his first conviction shall oftsoons offend in any thing concerning the premises, and shall in form aforesaid be thereof lawfully convicted, then the same person shall, for his second offence, suffer imprisonment during his life."||

In the construction hereof it hath been resolved,

That under the words parson, vicar, or other whatsoever minister that ought or should say the said common prayer, &c., those clergymen who have no cure, are included as much as those who have one, and that they are punishable for using any other form, &c., inasmuch as by their ordination they are obliged to officiate in the offices of the church, &c. And it is

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said that they are sufficiently shown to be in holy orders by the word *clericus* in the indictment.

Dyer, 203, pl. 73.

That this statute being not only in the affirmative, but also expressly saving the jurisdiction of the ecclesiastical courts, does not restrain them from proceeding against those offenders in their own methods as disturbers of the unity and peace of the church, and, consequently, that such persons may be deprived by the said court, according to the ecclesiastical law, for the first offence.

Cawdry's case, 5 Co. 5, 6; Poph. 59, S. C.; 2 Roll. Abr. 222, S. C.

And it is further enacted by 1 Eliz. c. 2, § 9, "That if any person shall in any interludes, plays, songs, rhymes, or by other open words, declare or speak any thing in the derogation, depraving, or despising of the same book, or any thing therein contained, or any part thereof; or shall by open fact, deed, or by open threatenings, compel or cause, or otherwise procure or maintain any parson, vicar, or other minister in any cathedral or parish-church, or in chapel, or in any other place, to sing or say any common or open prayer, or to minister any sacrament otherwise, or in any other manner and form, than is mentioned in the said book; or by any of the said means shall unlawfully interrupt or let any parson, vicar, or other minister in any cathedral, or parish church, chapel, or any other place, to sing or say common and open prayer, or to minister the sacraments or any of them, in such manner and form as is mentioned in the said book; then every such person being thereof lawfully convicted in form aforesaid, shall forfeit to the queen, our sovereign lady, her heirs and successors, for the first offence a hundred marks.

Whether, if the party die within six weeks, the said forfeiture be not discharged: since by the act of God the election of paying it, or suffering imprisonment in lieu of it, is taken away; *quære*, and vide Dyer, 203, 231.

§ 10. "And if any person or persons being once convict of any such offence, afterwards offend against any of the last recited offences, and shall in form aforesaid be thereof lawfully convict, then the same person so offending and convict, shall for the second offence forfeit to the queen, our sovereign lady, her heirs and successors, four hundred marks."

§ 11. "And if any person, after he in form aforesaid shall have been twice convict of any offence concerning any of the last recited offences, shall offend the third time, and be thereof in form aforesaid lawfully convict, then every person so offending and convict shall for his third offence forfeit to our sovereign lady the queen all his goods and chattels, and shall suffer imprisonment during his life."

§ 12. "And if any person or persons that for his first offence concerning the premises shall be convict in form aforesaid, do not pay the sum to be paid by virtue of his conviction, in such manner and form as the same ought to be paid within six weeks next after his conviction; then every person so convict, and so not paying the same, shall, for the same first offence, instead of the said sum, suffer imprisonment by the space of six months, without bail or mainprize."

§ 13. "And if any person or persons that for his said second offence concerning the premises shall be convict in form aforesaid, do not pay the said sum to be paid by virtue of his conviction and this statute, in such manner and form as the same ought to be paid, within six weeks next after his said second conviction; then every person so convicted, and so not pay-

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ing the same, shall for the said second offence, in the stead of the said sum, suffer imprisonment during twelve months, without bail or mainprize."

|| See further the Act of Uniformity, 13 & 14 Car. 2, c. 4, § 2, 3, 4, 5, 6, 17, 22, and 27.||

6. *Of the Offence of teaching School without conforming to the Church.*

By the 23 Eliz. c. 1, § 6, it is enacted, "That if any person or persons, body politic or corporate, shall keep or maintain any schoolmaster who shall not repair to church according to the form of the said statute, or be allowed by the bishop or ordinary of the diocese where such schoolmaster shall be so kept, shall forfeit for every month so keeping him, ten pounds."

§ 7. "Provided that no such ordinary or their ministers shall take any thing for the said allowance. And such schoolmaster or teacher presuming to teach contrary to the said act, and being thereof lawfully convicted, shall be disabled to be teacher of youth, and shall suffer imprisonment without bail or mainprize for one year."

And by the 1 Ja. 1, c. 4, § 9, it is enacted, "That no person shall keep any school or be a schoolmaster out of the universities or colleges of this realm, except it be in some public or free grammar school, or in some such nobleman's or noblewoman's, or gentleman's or gentlewoman's house, as are not recusants, or where the same schoolmaster shall be specially licensed thereunto by the archbishop, bishop, or guardian of the spiritualities of that diocese; upon pain that as well the schoolmaster, as also the party that shall retain or maintain any such schoolmaster contrary to the meaning of the said statute, shall forfeit each of them, for every day so wittingly offending, forty shillings."

And *note*: These statutes are still in force as to persons not within the benefit of the toleration act, 1 W. & M.; (a) but as to such persons they seem to be impliedly repealed by that act; and 12 Ann. c. 7, which obliged schoolmasters to subscribe the declaration concerning the liturgy, and to have a license from the bishop, is repealed by 5 Geo. 1, c. 4.

(a) Enlarged by 19 G. 3, c. 44.

|| By 19 G. 3, c. 44, § 2, "No dissenting minister, nor any other protestant dissenting from the church of England, who shall take the oaths, and make and subscribe the declaration directed by the above act of 1 W. & M., and a declaration in the words following: 'I, A B, do solemnly declare in the presence of Almighty God, that I am a Christian and a protestant, and as such that I believe that the Scriptures of the Old and New Testament, as commonly received among protestant churches, do contain the revealed will of God; and that I do receive the same as the rule of my doctrine and practice;' shall be prosecuted in any court whatsoever, for teaching and instructing youth as a teacher or schoolmaster."

§ 3. "Provided always, That nothing in this act contained shall extend, or be construed to extend, to the enabling of any person dissenting from the church of England, to obtain or hold the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, unless the same shall have been founded since the first year of the reign of their late majesties King William and Queen Mary, for the immediate use and benefit of protestant dissenters."

By 31 G. 3, c. 32, § 13, "No ecclesiastic, or other person professing the Roman Catholic religion, who shall take and subscribe the oath of allegiance,



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abjuration, and declaration in this act mentioned and appointed to be taken and subscribed, shall be prosecuted in any court whatsoever for teaching and instructing youth as a tutor or schoolmaster."

§ 14. "Provided always, That no person professing the Roman Catholic religion shall obtain or hold the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, or shall keep a school in either of the universities of Oxford and Cambridge."

§ 15. "Provided also, That no schoolmaster professing the Roman Catholic religion shall receive into his school for education, the child of any protestant father."

§ 16. "Provided also, That no person professing the Roman Catholic religion shall be permitted to keep a school for the education of youth, until his or her name or description as a Roman Catholic schoolmaster or schoolmistress shall have been recorded at the quarter or general sessions of the peace, for the county, or other division or place where such school shall be situated, by the clerk of the peace of the said court, who is hereby required to record such name and description accordingly, upon demand by such person, and to give a certificate thereof to such person as shall at any time demand the same; and no person offending in the premises shall receive any benefit of this act."

§ 17. "Provided also, That nothing in this act contained shall make it lawful to found, endow, or establish any school, academy, or college, by persons professing the Catholic religion within these realms, or the dominions thereunto belonging."

*7. Of the Offence in not coming to Church: And herein,*

*1. What Forfeitures of Money, Lands, or Goods such Offenders incur.*

By 1 Eliz. c. 2, § 14, it is enacted, "That all and every person and persons inhabiting within this realm, or any other the queen's majesty's dominions, (a) shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof, to some usual place where common prayer and such service of God shall be used in such time of let, upon every Sunday, and other days ordained and used to be kept as holydays, and then and there to abide orderly and soberly (b) during the time of the common prayer, preaching, or other service of God there to be used and ministered; upon pain of punishment by the censures (c) of the church, and also upon pain that every person so offending shall forfeit for every such offence twelve pence."

(a) An indictment or suit on this statute need not show that the party was an inhabitant of the king's dominions, or that he had no reasonable excuse to be absent; but the defendant, if he hath any matter of this kind in his favour, must show it himself. 2 Leon. 5; Godb. 148.—Nor need the offence be alleged in the county where the party was in truth at the time, because a mere non-feasance, and properly speaking not committed any where. And. 139; Hob. 251. (b) A misbehaviour at church, or absence from morning or evening service, is equally punishable with a total absence; also, he who is absent from his own parish church shall be obliged to prove where he went to church. Vide Roll. Rep. 93; Godbolt, 148; Sid. 230. (c) If the spiritual court ground its proceedings on this statute, and refuse to allow a reasonable excuse, it shall be prohibited; but not where it proceeds merely on the canons of the church. 2 Roll. Rep. 438, 455; Buls. 159; Gibs. Cod. 358.

By 3 Ja. c. 4, § 27, "If any subject of this realm shall not resort or repair every Sunday to some church, chapel, or some other usual place

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appointed for common prayer, and there hear divine service according to the statute made in that behalf in the first year of the reign of the late Queen Elizabeth, then it shall and may be lawful to and for any one justice of peace of that limit, division, or liberty, wherein the said party shall dwell, upon proof to him made of such default, by confession of the party, or oath of witness, to call the said party before him; and if he or she shall not make a sufficient excuse and due proof thereof, to the satisfaction of the said justice of peace, it shall be lawful for the said justice of peace to give warrant to the churchwarden of the said parish wherein the said party shall dwell, under his hand and seal, to levy twelve pence for every such default by distress and sale of the goods of every such offender, rendering to the said offender the overplus of the money raised of the said goods so to be sold. And in default of such distress, it shall and may be lawful for the said justice of peace to commit every such offender to some prison within the said shire, division, limit, or liberty, wherein such offender shall be inhabiting, until payment be made of the said sum or sums so to be forfeited; which forfeiture shall be employed to and for the use of the poor of the parish wherein the offender shall be resident or abiding at the time of such offence committed."

§ 28. "Provided, That no man be impeached upon this clause, except he be called in question for his said default within one month next after the said default made."

§ 29. "And that no man being punished according to this branch, shall for the same offence be punished by the forfeiture of twelve pence upon the law made in the first year of the late Queen Elizabeth."

By the 23 Eliz. c. 1, § 5, it is enacted, "That every person above the age of sixteen years, which shall not repair to some church, chapel, or usual place of common prayer, but forbear the same, contrary to the tenor of the said statute of 1 Eliz. c. 2, being thereof lawfully (*a*) convicted, shall forfeit to the queen's majesty, for every (*b*) month which he or she (*c*) shall so forbear, (*d*) twenty pounds||of lawful English money; and that over and besides the said forfeitures, every person so forbearing by the space of twelve months as aforesaid, shall for his or her obstinacy, after certificate thereof in writing made into the court commonly called the King's Bench, by the ordinary of the diocese, a justice of assize or jail-delivery, or a justice of peace of the county where such offender shall dwell or be, be bound with two sufficient sureties in the sum of two hundred pounds at least, to the good behaviour, and so to continue bound until such time as the persons so bound do conform themselves and come to the church, according to the true meaning of the said statute made in the said first year of the queen's majesty's reign."

(*a*) This is no more than what the law implies, and therefore there must be a judgment on the conviction to cause a forfeiture. Dyer, 160, pl. 40; 11 Co. 57 b, 59 b; Roll. Rep. 89, 233; 3 Buls. 87; Lutw. 162.—A condemnation by demurrer or *nihil dicit* is as much within the statute as a conviction by verdict. 11 Co. 58; Roll. Rep. 89, 90. (*b*) Which is to be understood a lunar month, or 28 days, according to the common rule of expounding statutes which speak generally of a month. || Bishop of Peterborough v. Catesby, Yelv. 100; Cro. Ja. 167, S. C.; Dormer v. Smith, Cro. Eliz. 835; 2 Roll. Abr. tit. *Temps* (C. pl. 1, 3, 4); R. v. Cussens, 1 Sid. 186; Woodward v. Hamersly, Skin. 313; 4 Mod. 95, S. C. cited. Stretchpoint v. Savage, 12 Mod. 641. So Comyns, in Dig. tit. *Ann* (B) says, "In all cases where a statute speaks of a month, it shall be intended of a lunar month, which contains twenty-eight days, and not of any other," and cites a number of authorities. And yet, from the language of Mr. Butler, in his Historical Memoirs of the English Catholics, vol. i. 166, we are led to suppose that this construction of the word month was peculiar to the statutes of recusancy. "The penalties," he says, "were rigorously exacted. Every

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fourth Sunday of absence was held to complete the month; and thus, *in relation to these penalties*, thirteen months were supposed to occur in every year."|| (c) One sick for part of the time shall not be excused, if it be proved that he was a recusant before and after. Cro. Ja. 529. (d) This forfeiture of twenty pounds dispenses not with that of twelve pence given by 1 Eliz. c. 2.

§ 13. "Provided also, That every person which usually on the Sunday shall have in his or her house the divine service which is established by the law of this realm, and be thereat himself or herself usually or most commonly present, and shall not obstinately refuse to come to church, and there to do as is aforesaid, and shall also four times in the year at the least be present at the divine service in the church of the parish where he or she shall be resident, or in some other open common church, or such chapel of ease, shall not incur any pain or penalty limited by this act for not repairing to church."||

By the (a) 28 Eliz. c. 6, and 3 Ja. c. 4, it is enacted, "That every offender being convicted of not coming to church, contrary to the purport of the statutes above mentioned, shall pay twenty pounds for every month after such conviction, until he shall conform himself, and come to church; and that if the offender shall have made default of payment of the twenty pounds both for every month contained in the conviction, and also for every month subsequent, during which he shall not conform himself to the church, the king shall seize, take, and enjoy all his goods, and two parts of his hereditaments, leases, and farms, leaving the third part only of the same hereditaments, leases, and farms, to and for the maintenance and relief of the same offender, his wife, children, and family, notwithstanding any prior conveyance thereof made by such offender, with power of revocation, or to the use of himself or his family. Also, by the said statute of 3 Ja. 1, the king may refuse the penalty of twenty pounds a month, though it be tendered according to law, and thereupon seize two parts of all the hereditaments, leases, and farms which at the time of such seizure shall be, or afterwards shall come to any such offender, or to any other to his use, or in trust for him, or at his disposition, or whereby or in consideration whereof he or his family shall be relieved, maintained, or kept, leaving unto him his chief mansion-house as part of his third part."

(a) That this statute is the 28th, and not the 29th, as it is sometimes improperly called.

In the construction of these statutes it hath been holden.

1. That the king by making his election given him by 3 Ja. 1, c. 4, to seize the offender's hereditaments, &c., waves the benefit of the twenty pounds a month, and the power of seizing the offender's goods.

Jones, 24; Cawley, 171.

2. That bonds, recognisances, &c., taken in the offender's own name, or in the names of others to his use, come within the words, *all his goods, &c.*

12 Co. 1, 2; Leon. 98; Roll. Rep. 7.

3. That no copyhold lands are within either of the statutes, by reason of the prejudice that would accrue thereby to the lord of the manor.

Owen, 37; Leon. 97.

4. That though it may be doubtful on the statute 28 Eliz. c. 6, whether lands conveyed in trust by some friend for the recusant may be seized; yet it is clear that such lands may be seized by 3 Ja. 1, c. 4, which expressly provides, that the king, upon his waving the forfeiture of twenty

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pounds a month, may seize two parts of all the hereditaments, &c. which shall come to any such offenders, or to others to their use, or in trust for them.

Lane, 105; Cawley, 169; 12 Co. 1, 2.

5. But that the king cannot seize lands of which the offender is seised in trust for another, although the statute hath made no express provision for *cestui que trust*.

Lane, 39; Hard. 466.

6. That the profits of the lands seized by the king by force of 28 Eliz. c. 6, for the non-payment of the twenty pounds a month, ought not to be applied to the satisfaction thereof, but that the lands ought to remain in the king's hands by way of pledge, till the whole forfeiture be paid some other way; but this construction of the statute seeming over severe (a), it was provided by 3 Ja. 1, c. 4, that the profits of the said lands should go towards the satisfaction of the twenty pounds.

Cro. Eliz. 845; 2 Roll. Rep. 25; Palm. 41; Jones, 24; Hawk. P. C. c. 10, § 17. (a) || It would seem to have been the intent of the statute of James to increase rather than to mitigate the severity of the statute of Elizabeth; the profits of the land were not to go towards satisfaction, but in lieu and full recompense of the twenty pounds monthly that should incur during the seizure and retainer. That penalty, though it pressed hard upon people of small living, was not felt, and easily paid by men of better ability, and therefore the statute empowered the crown, where it should see fit, to waive the penalty and seize the lands.||

|| By the toleration act of 1 W. & M. c. 18, § 16, it is provided, "That all the laws made and provided for the frequenting of divine service on the Lord's day, commonly called Sunday, shall be still in force and executed against all persons that offend against the said laws, except such persons come to some congregation or assembly of religious worship allowed or permitted by this act."||

2. *In what Manner they are to be proceeded against for those Forfeitures.*

As to the forfeiture of twelve pence, it is, by the 1 Eliz. c. 2, and 3 Ja. 1, c. 4, enacted, That the said forfeiture of twelve pence for the absence of a Sunday or holiday may, on the confession of the party, or oath of one witness, &c., be levied on the goods of the offender, &c., by the warrant of a justice of peace to the churchwardens of the parish where the party dwells, and employed to the use of the poor.

As to the forfeiture of twenty pounds for a month's absence, by the 23 Eliz. c. 1, 28 Eliz. c. 6, and 3 Ja. 1, c. 4, the same may be recovered by indictment, not only in the Court of King's Bench, but also before justices of oyer, assize, jail-delivery, and quarter sessions of the peace: And by the 3 Ja. 1, c. 4, § 7, it is enacted, That upon an indictment at the assizes, jail-delivery, or general sessions of the peace, proclamation shall be made, that the offender render himself to the sheriff before the next assizes, jail-delivery, or sessions; and that if he shall not then make appearance of record, upon such default recorded, the same shall be a conviction in law, as if a trial by verdict on the indictment had been recorded: and by the said statute every such conviction shall be certified into the Exchequer.

For the exposition of these clauses of the statutes, vide Hawk. P. C. c. 10, § 20, &c.

By the 35 Eliz. c. 1, § 10, it is enacted, "That all and every the said pains, duties, forfeitures, and payments, shall and may be recovered and levied to her majesty's use, by action of debt, bill, plaint, information, or otherwise, in any of the courts commonly called the King's Bench, Common Pleas, or Exchequer, in such sort and in all respects, as by the ordinary

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course of the common laws of this realm any other debt due by any such person in any other case should or may be recovered or levied, wherein no essoin, protection, or wager of law shall be admitted or allowed."

3. *What other Inconveniences they are subject to.*

By the 23 Eliz. c. 1, § 5, it is enacted, That every person, forbearing the church twelve months, shall on certificate thereof into the King's Bench, by the ordinary, a justice of assize and jail-delivery, or a justice of peace of the county where such offender shall dwell or be, be bound with two sufficient sureties in the sum of two hundred pounds, at the least, to the good behaviour, and so continue bound until such offender shall conform himself, &c.

4. *By what Means they may be discharged.*

By the 23 Eliz. c. 1, § 10, it is enacted, "That every person guilty of any offence against this statute, ||other than treason or misprision of treason,|| who shall, before he be thereof indicted, or at his arraignment or trial before judgment, submit and conform himself before the bishop of the diocese where he shall be resident, or before the justices where he shall be indicted, arraigned, or tried, (having not before made like submission at any his trial, being indicted for his first like offence,) shall, upon his recognition of such submission, in open assizes or sessions of the county where such person shall be resident, be discharged of all and every the said offences against this statute, ||(except treason and misprision of treason,) and of all pains and forfeitures for the same."||

And by the 28 Eliz. c. 6, § 6, "That whensoever any such offender shall make submission, and become conformable according to the form limited by the same statute of 23 Eliz. c. 1,—or shall fortune to die; that then no forfeiture of 20*l.* for any month, or seizure of the lands of the same offender, from and after such submission and conformity, or death, and full satisfaction of all the arrearages of twenty pounds monthly, before such seizure due or payable, shall ensue, or be continued against such offender, so long as the same person shall continue in coming to divine service, according to the intent of the said statute."

By the 1 Ja. 1, c. 4, it is enacted, "That recusant conforming himself according to the meaning of the above-mentioned statutes, &c., shall, during such conformity, be (a) discharged of all penalties which he might otherwise sustain by reason of his recusancy."

(a) And may plead his conformity to a suit either by the informer or king, and even after judgment may have an *audita querela* against the informer. Also, he may plead it after a judgment for the king, before execution awarded; but after execution hath been awarded for the king, or the profits of his lands on a seizure have been actually taken to the king's use, he hath no other remedy but by petition to the king. Raym. 391; 2 Jon. 187; Mod. 213.

If the heir of a recusant be a conformist, he is discharged by 1 Ja. 1, c. 4, as to all penalties happening by reason of his ancestor's recusancy, unless two parts of his lands were seized by the king in his ancestor's life, in which case they shall continue in the king's hands till the whole debt be levied.

5. *How a Person is punishable for suffering such Absence in others.*

By the 3 Ja. 1, c. 4, § 32, "||Every person and persons which shall willingly maintain, retain, relieve, keep, or harbour in his or their house, any

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servant, sojourner, or stranger, who shall not go to, or repair to some church or chapel, or usual place of common prayer, to hear divine service, but shall forbear the same by the space of one month together, not having a reasonable excuse, contrary to the laws and statutes of this realm, shall forfeit ten pounds for every month, that he, she, or they, shall so relieve, maintain, retain, keep, or harbour any such servant, sojourner, or stranger, in his or their house, so forbearing as aforesaid."

And by § 33, "Every person which shall retain, or keep in his or their service, fee, or livery, any person or persons, which shall not go to, or repair to some church, chapel, or usual place of common prayer to hear divine service, but shall forbear the same by the space of one month together, shall forfeit for every month, he, she, or they shall so retain, keep, or continue in his, her, or their service, fee, or livery, any such person or persons so forbearing as aforesaid, knowing the same, ten pounds."

§ 34. "This act shall not extend to punish or impeach any person or persons for maintaining, retaining, relieving, keeping, or harbouring his, her, or their father or mother wanting, without fraud or covin, other habitation, or sufficient maintenance, or the ward of any such person, or any person that shall be committed by authority to the custody of any by whom they shall be so relieved, maintained, or kept, any thing in this act contained to the contrary notwithstanding."||

8. *Of Offences against the Established Church by Protestant Dissenters.*

By the 31 Eliz. c. 1, obstinate nonconformists were compellable to abjure the realm, and were also subject to other penalties; and dissenters were farther restrained by 17 Car. 2, c. 2, and 22 Car. 2, c. 1, but at this day, by 1 W. & M. c. 18, all persons dissenting from the church (except papists, and those who shall in preaching or writing deny the doctrine of the Trinity) are exempted from all penal laws relating to religion; except 25 Car. 2, c. 2, (by which all officers of trust are bound to receive the sacrament according to the usage of the church of England, and also to take the oaths of allegiance and supremacy, and the test; and also, except 30 Car. 2, c. 1, by which the members of both houses of parliament, and all the king's sworn servants, are bound to make a declaration against transubstantiation, and the invocation of saints, and the sacrifice of the mass;) provided such dissenters take the oaths of allegiance and supremacy, and make the said declaration against transubstantiation, &c., and come to some congregation for religious worship in some place registered, (a) either in the bishop's court, or at sessions, the doors whereof shall neither be locked, barred, nor bolted.

(a) [In registering the certificate the justices are merely ministerial; and if the persons resorting to the meeting-house do not bring themselves within this act, the registering will not protect them from the penalties of the law. *Rex v. Justices of Derbyshire*, 1 Bl. Rep. 606; 4 Burr. 1991, S. C., cited in the 15 East, 587.]

Also, by the statute 1 W. & M. c. 18, § 8, persons dissenting from the church of England, in holy orders, or pretended holy orders, or pretending to holy orders, and preachers or teachers of any congregation of dissenting protestants, if they take the said oaths, &c., at the general or quarter sessions, to be held for the place where such persons live, and subscribe the thirty-nine articles of the church of England, except those few scrupulous ones concerning church government and infant baptism, shall not be liable to any of the pains or penalties mentioned in the acts of 17 Car. 2, c. 2, and 13 & 14 Car. 2, c. 4. (b) And by 10 Ann. c. 2, they may qualify them-

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selves as well during a prosecution upon any penal statute as before, and being qualified in one county may officiate in another,<sup>(c)</sup> upon producing a certificate, and taking the said oaths, &c., if required.

(b) [But the subscription to the non-excepted articles being alleged to press too hard upon some tender consciences, it is now no longer required, and the benefit of this act is extended by 19 Geo. 3, c. 14, to all protestant dissenting ministers upon their taking the oaths, making and subscribing the declaration against popery, and also the following declaration: "I, A B, do solemnly declare, in the presence of Almighty God, that I am a Christian and a Protestant, and as such that I believe, that the Scriptures of the Old and New Testament, as commonly received among Protestant churches, do contain the revealed will of God, and that I do receive the same as the rule of my doctrine and practice."—This act, as well as the toleration act, are declared to be public acts; the latter had been holden to be a private act. Reg. v. Larwood, 4 Mod. 274; 1 Ld. Raym. 30. (c) The contrary was formerly holden, vide Salk. 572.]

And by the statute 1 W. & M. c. 18, those who scruple the taking of any oath are within the like indulgence, provided they subscribe the aforesaid declaration, and also a declaration of fidelity to the king, and against the deposing doctrine and papal supremacy, and also profess their faith in God the Father, and Jesus Christ his eternal Son, the true God, and the Holy Spirit, one God for evermore; and acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration.

|| See further as to the people called Quakers, 7 & 8 W. 3, c. 34, 8 G. c. 6.||

|| By 52 G. 3, c. 155, the statutes of 13 & 14 Car. 2, c. 1, of 17 Car. 2, c. 2, and 22 Car. 2, c. 1, are repealed.

And by § 2, "No congregation or assembly for religious worship of protestants (at which there shall be present more than twenty persons besides the immediate family and servants of the person in whose house or upon whose premises such meeting, congregation, or assembly shall be had) shall be permitted or allowed, unless and until the place of such meeting, if the same shall not have been duly certified and registered under any former act or acts of parliament relating to registering places of religious worship, shall have been or shall be certified to the bishop of the diocese, or to the archdeacon of the archdeaconry, or to the justices of the peace at the general or quarter sessions of the peace for the county, riding, division, city, town, or place in which such meeting shall be held; and all places of meeting which shall be so certified to the bishop's or archdeacon's court, shall be returned by such court once in each year to the quarter sessions of the county, riding, division, city, town, or place; and all places of meeting which shall be so certified to the quarter sessions of the peace shall be also returned once in each year to the bishop or archdeacon; and all such places shall be registered in the said bishop's or archdeacon's court respectively, and recorded at the said general or quarter sessions; the registrar or clerk of the peace whereof respectively is hereby required to register and record the same; and the bishop or registrar or clerk of the peace to whom any such place or meeting shall be certified under this act shall give a certificate thereof to such person or persons as shall request or demand the same, for which there shall be no greater fee nor reward taken than two shillings and sixpence; and every person who shall knowingly permit or suffer any such congregation or assembly as aforesaid to meet in any place occupied by him, until the same shall have been so certified as aforesaid, shall forfeit, for every time any such congregation or assembly shall meet contrary to the provisions of this act, a sum not exceeding twenty pounds, nor less than twenty shillings, at the discretion of the justices who shall convict for such offence."

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§ 3. "Provided, That every person who shall teach or preach in any congregation or assembly as aforesaid, in any place, without the consent of the occupier thereof, shall forfeit for every such offence any sum not exceeding thirty pounds, nor less than forty shillings, at the discretion of the justices who shall convict for such offence."

§ 4. "And every person who shall teach or preach at, or officiate in, or shall resort to any congregation or congregations, assembly or assemblies for religious worship of protestants, whose place of meeting shall be duly certified according to the provisions of this act, or any other act or acts of parliament relating to the certifying and registering of places of religious worship, shall be exempt from all such pains and penalties under any act or acts of parliament relating to religious worship, as any person who shall have taken the oaths, and made the declaration prescribed by or mentioned in an act made in the first year of the reign of King William and Queen Mary, intituled, 'An act for exempting their majesty's protestant subjects dissenting from the church of England, from the penalties of certain laws,' or any act amending the said act, is by law exempt, as fully and effectually as if all such pains and penalties, and the several acts enforcing the same, were recited in this act, and such exemptions as aforesaid were severally and separately enacted in relation thereto."

§ 5. "Provided, That every person not having taken the oaths, and subscribed the declaration hereinafter specified, who shall preach or teach at any place of religious worship certified in pursuance of the directions of this act, shall, when thereto required by any one justice of the peace, by any writing under his hand, or signed by him, take and make and subscribe, in the presence of such justice of the peace, the oaths and declarations specified and contained in an act passed in the nineteenth year of the reign of his majesty King George the Third, intituled, 'An act for the further relief of protestant dissenting ministers and schoolmasters;' and no such person who, upon being so required to take such oaths and make such declaration as aforesaid, shall refuse to attend the justice requiring the same, or to take and make and subscribe such oaths and declaration as aforesaid, shall be thereafter permitted or allowed to teach or preach in any such congregation or assembly for religious worship, until he shall have taken such oaths, and made such declaration as aforesaid, on pain of forfeiting, for every time he shall so teach or preach, any sum not exceeding ten pounds, nor less than ten shillings, at the discretion of the justice convicting for such offence."

§ 6. "Provided, That no person shall be required by any justice of the peace to go to any greater distance than five miles from his own home, or from the place where he shall be residing at the time of such requisition, for the purpose of taking such oaths as aforesaid."

§ 7. "It shall be lawful for any of his majesty's protestant subjects to appear before any one justice of the peace, and to produce to such justice of the peace a printed or written copy of the said oaths and declaration, and to require such justice to administer such oaths and to tender such declaration to be made, taken, and subscribed by such person; and thereupon it shall be lawful for such justice, and he is hereby authorized and required, to administer such oaths and to tender such declaration to the person requiring to take and make and subscribe the same; and such person shall take and make and subscribe such oaths and declaration in the presence of such justice accordingly; and such justice shall attest the same to be sworn before him, and shall transmit or deliver the same to the clerk of the peace for the county,



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riding, division, city, town, or place for which he shall act as such justice of the peace, before or at the next general or quarter sessions of the peace for such county, riding, division, city, town, or place.

§ 8. "Every justice of the peace before whom any person shall make and take and subscribe such oaths and declaration as aforesaid, shall forthwith give to the person having taken, made, and subscribed such oaths and declaration, a certificate thereof under the hand of such justice, in the form prescribed by the act: And for the making and signing of such certificate, where the said oaths and declaration are taken and made on the requisition of the party taking and making the same, such justice shall be entitled to demand and have a fee of two shillings and sixpence, and no more: And such certificate shall be conclusive evidence that the party named therein has made and taken the oaths and subscribed the declaration in manner required by this act.

§ 9. "Every person who shall teach or preach in any such congregation or assembly, or congregations or assemblies as aforesaid, who shall employ himself solely in the duties of a teacher or preacher, and not follow or engage in any trade or business, or other profession, occupation, or employment, for his livelihood, except that of a schoolmaster, and who shall produce a certificate of some justice of the peace of his having taken and made and subscribed the oaths and declaration aforesaid, shall be exempt from the civil services and offices specified in the said recited act passed in the first year of King William and Queen Mary, and from being balloted to serve and from serving in the militia or local militia of any county, town, parish, or place in any part of the United Kingdom.

§ 10. "And every person who shall produce any false or untrue certificate or paper, as and for a true certificate of his having made and taken the oaths and subscribed the declarations by this act required for the purpose of claiming any exemption from civil or military duties as aforesaid, under the provisions of this or any other act or acts of parliament, shall forfeit for every such offence the sum of fifty pounds; which penalty may be recovered by and to the use of any person who will sue for the same by any action of debt, bill, plaint, or information in any of his majesty's courts of record at Westminster, or the courts of great sessions in Wales, or the courts of the counties palatine of Chester, Lancaster, and Durham, (as the case shall require;) wherein no essoign, privilege, protection, or wager of law, or more than one imparlance, shall be allowed.

§ 11. "No meeting, assembly, or congregation of persons for religious worship, shall be had in any place with the door locked, bolted or barred, or otherwise fastened, so as to prevent any persons entering therein during the time of any such meeting, assembly, or congregation; and the person teaching or preaching at such meeting, assembly, or congregation, shall forfeit for every time any such meeting, assembly, or congregation shall be held with the door locked, bolted, barred, or otherwise fastened as aforesaid, any sum not exceeding twenty pounds, nor less than forty shillings, at the discretion of the justices convicting for such offence.

§ 12. "If any person or persons, at any time after the passing of this act, do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly or congregation of persons assembled for religious worship, permitted or authorized by this act, or any former act or acts of parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or con-

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gregation, or any person or persons there assembled, such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties to be bound by recognisances in the penal sum of fifty pounds to answer for such offence, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and, upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of forty pounds.

§ 13. "Nothing in this act contained shall affect or be construed to affect the celebration of divine service according to the rights and ceremonies of the United Church of England and Ireland, by ministers of the said church, in any place hitherto used for such purpose, or being now or hereafter duly consecrated or licensed by any archbishop or bishop or other person lawfully authorized to consecrate or license the same, or to affect the jurisdiction of the archbishops or bishops, or other persons exercising lawful authority in the church of the United Kingdom over the said church, according to the rules and discipline of the same, and to the laws and statutes of the realm; but such jurisdiction shall remain and continue as if this act had not passed.

§ 14. "Nothing in this act contained shall extend or be construed to extend to the people usually called Quakers, nor to any meetings or assemblies for religious worship held or convened by such persons; or in any manner to alter or repeal or affect any act, other than and except the acts passed in the reign of King Charles the Second hereinbefore repealed, relating to the people called Quakers, or relating to any assemblies or meetings for religious worship held by them."||

[If a man be a professed churchman, and his conscience will permit him sometimes to go to meetings, instead of coming to church, the toleration act will not excuse him. Per Holt, C. J.

6 Mod. 190.

Nor will it authorize a minister to exercise his functions, without being licensed by the bishop, in a chapel of ease according to the rites of the church of England; for the act was made to protect tender consciences from penalties; and to extend it to those of the church who act contrary to its rules and discipline, would introduce an endless confusion.

Dr. Trebee v. Keith, 2 Atk. 498.

The law so far favours dissenters upon the foundation of this act, that charities are permitted to be established for the support of dissenting ministers; and a *mandamus* (a) will issue to admit or restore them. And in the present disposition of the courts, prosecutions against dissenters for occasional non-compliance with all the requisitions of the statutes do not seem likely to meet with any great encouragement.(b)

Attorney-General v. Cook, 2 Ves. 273. || Lloyd v. Spillet, 3 P. Wms. 344; 2 Atk. 48, S. C.; Barnardist, Ch. Rep. 384, S. C.; Corbyn v. French, 4 Ves. 418; De Costa v. D'Pays, Ambl. 228; and cited Ibid. 712, and 7 Ves. 76; Attorney-General v. Pearson, 3 Mer. 353.|| (a) R. v. Barker, 3 Burr. 1265. But see R. v. Jotham, 3 T. R. 575, the difference between a *mandamus to admit*, and a *mandamus to restore*. (b) R. v. Hall, 1 T. R. 320.

The toleration-act exempts dissenting ministers from serving upon juries, and from county, ward, or parish offices.]

|| The exemption from offices extends to those subsequently created, as well as to those then in being; and the minister is entitled to it, although

engaged in trade. The act was not confined to the present time, but intended to be perpetual.

Kenward v. Knowles, Willes, 463 ; Attorney-General v. Cook, *ubi supra*.

It has been ruled, that to entitle a protestant dissenter to be admitted by the justices in sessions to take the oaths, and to make and subscribe the declaration as required by the above act of 1 W. & M. c. 18, § 8, in order to qualify himself to officiate as a preacher or teacher of a dissenting congregation, he must show himself to be the acknowledged teacher or preacher of some particular congregation, or bring himself within some other qualifying description in the act. But if he states himself to be a minister of a certain congregation, it is not necessary for him to produce a certificate from two of his congregation, authenticating his appointment. Nor, if he brings himself within the true meaning of any other qualifying description, is it necessary for him to be the preacher or teacher of a separate congregation.

R. v. The Justices of Denbighshire, 14 East, 285 ; R. v. The Justices of Suffolk, 15 East, 590 ; R. v. Justices of Gloucestershire, 15 East, 577. As to the meaning of the qualification in the act "pretending to holy orders," *qu.* ; and vide *Ibid.*, and Cator's case, Skin. 80.]]

[By 1 Geo. 1, st. 2, c. 5, it is felony without benefit of clergy to destroy any religious meeting-house registered according to the toleration act ; and the hundred is made liable to the damages.]

It has been holden, since this statute, that a prohibition lies to the spiritual court proceeding against persons for incontinency who have been married in a licensed conventicle.

3 Lev. 376. [See the marriage-act, 25 G. 2, c. 33.]

|| By 5 G. c. 4, § 2, it is enacted, "That if any mayor, bailiff, or other magistrate in that part of Great Britain called England, the dominion of Wales, or town of Berwick-upon-Tweed, or the isles of Guernsey or Jersey, shall knowingly or wilfully resort to, or be present at any public, meeting for religious worship, other than of the church of England as by law established, in the gown or other peculiar habit, or attended with the ensign or ensigns of or belonging to such his office, that every such mayor, bailiff, or other magistrate, being thereof convicted by due course of law, shall be disabled to hold such office or offices, employment or employments, and shall be adjudged incapable to bear any public office or employment whatsoever within that part of Great Britain called England, the dominion of Wales, and town of Berwick-upon-Tweed, or isles of Jersey and Guernsey."||

||(For the 9 G. 4, c. 17, repealing the acts requiring the sacrament to be taken as a qualification for offices, see tit. "OFFICES & OFFICERS,"(E).||

## HERIOT.

(A) Of the Original and Nature of Heriots.

(B) Of the several Kinds, and where a Heriot shall be said to be due : And herein,

1. Where a Heriot shall be said to be due by Custom.

2. Where a Heriot shall be said to be due by Tenure or Reserration.

(C) Of the Remedies to be pursued for the Recovery of a Heriot where it is due.

(A) Of the Original and Nature of Heriots.

THE heriot duty is thought by our best antiquaries to be far more ancient than and to differ from (a) *relief*. Its original seems to be thus :

Spelm. 287. (a) *Relief* began in this manner : When the feuds were only for life, yet if the tenant had any son or relation fit for the service, the tenant would recommend him to the lord, and the lord would generally let him in on better terms than any other; and thus began the payment of money on new admittances, which, when the feud became inheritable, was turned into a sum certain, and was called a *relief*, being originally a charitable benignity to the heir, to admit him though he paid not the full value of the land. See Wright, of Tenures, 97.—And Fleta, [in the very words of Bracton, lib. 2, c. 36, fo. 86 a.] thus defines a heriot : *Heriotium est quedam præstatio ubi tenens liber, vel servus in morte sua dominum suum respicit de meliori averio suo vel de secundo meliori, quæ quidem præstatio magis fit de gratia quam de jure, et nullam habet comparationem ad reherium, eo quod hæred. non contingit, quia factum est antecessoris.* Fleta, lib. 3, c. 18.—My Lord Coke says, that heriots are very ancient, and that they were preferred to mortuaries, the lord being entitled to the best beast, and the second only being due as a mortuary. Co. Lit. 185 b.

Anciently, when the tenures were military, and for life only, the arms and war-horse of the tenant, upon his death, went, together with the land, to the lord, being due to him, as having been purchased out of the profits of the land, or as having been originally granted by the lord for public defence, and therefore belonged to the lord, that he might bestow them on the succeeding tenant for the like service. But, when the feud became inheritable, the reason of the heriot ceased, and then the arms and war-horse went to the heir who succeeded to the land. Yet in some manors the custom of the heriot was by particular agreement retained, or the lord reserved it as parcel of his tenure. And though originally the heriot was the (a) best horse, yet in time it came to be the best beast; for the tenants, to disappoint their lords, would often sell their arms and horses, and then of necessity a law was made that the lord might take the best beast in lieu of them, and so the heriot came to be esteemed the best beast ever after. And as it arose by custom, or tenure, after the feud became inheritable, hence we find, in some manors, a custom of paying it in (b) goods, and in some, in money.

Spel. Gloss. 287; Braet. lib. 2, fo. 60; Britton. 178. (a) That in the Saxon language the word heriot signifies armour, weapons, or provision, being derived from "*here*," army, and "*geat*," provision; and was a tribute of old given to the lord of a manor for his better preparation towards war; and therefore at its first institution was paid in arms, and habiliments of war. Fortesc. in the Preface to Absolute and Limited Monarchy, 57; Willes's Rep. 194. || Lord Coke derives the word from "*here*," lord, and "*geat*," best; that is, the lord's best. Co. Lit. 185 b. Perhaps it may be derived from "*here*," *dominus*, and "*geld*," *tributum*; for in Scotland it is called "*Herrezelde*," which is of the same signification. Vide Skene. || (b) Vide Kitchen, 133.

It appears, not only from Spelman's conjectures, but likewise from the (c) laws themselves by king Canutus, that the Danes were the first inventors of heriots (d), and that it was a political institution of theirs, whereby the Danish tenants were to hold by military service, and their arms and horses, at their deaths, to revert to the public; by which means the whole strength and defence of the kingdom were put into their hands, whilst only the affairs of agriculture, and the improvement of the nation were committed to the English, who thereby indeed enjoyed greater freedom and immunities in their tenures than the Danish tenants did.

Spel. 287. (c) In Lambard we have an account of these laws, and among others, that which follows: *Si quis incuriâ sive mortè repentina fuerit intestat. mortuus dominus tamen nullam rerum suarum partem (præterquam quæ de jure debetur herriotti nomine) sibi assumpto, verum ea judicio suo uxori, liberis et cognatione proximis juste pro suo cuique jure distributio.* Lamb. Sax. Laws, 119.—In Co. Lit. 185 b, the same law is cited. (d) || It would seem that heriots were of earlier introduction than the time of the Danes.

(B) Of the several Kinds, &amp;c.

Canute, in his law, speaks of them as an ancient custom; they are referred to as such under Edgar, (Hist. Eliens, 480,) and Edgar himself describes them as an ancient institution in the charter in which he frees the monasteries from the obligation. (Seldeni Spicileg. ad Eadm. p. 153.) Spelman gives them a higher and more extensive origin, and traces it up to Clovis on his victory over the Germans.||

(B) Of the several Kinds, and where a Heriot shall be said to be due: And herein,

1. *Where a Heriot shall be said to be due by Custom.*

As to the several kinds of heriots, some are due by custom, some by tenure, and some by reservation on deeds executed within time of memory. Those due by custom are the most frequent, and arose by contract or agreement of the lord and tenant, in consideration of some benefit or advantage accruing to the tenant, for which a heriot, as the best beast, best piece of household furniture, &c., became due and belonged to the lord, either on the death or (a) alienation of the tenant, and which the lord might seize, either within the manor or without, at his election.

Dyer, 199 b; Bro. tit. *Heriot*, 2, 3. (a) That a heriot may be due by custom as well upon an alienation of the tenant, as by his death. 8 Co. 106 a; Palm. 342. ||Kyte. 133 a. By the custom of the manor of Cuckfield, in Sussex, it is due on both those events.—In *Parkin v. Radcliffe*, 1 Bos. & Pull. 282, a custom was alleged to have a heriot on the *in-coming* of a purchaser.||

But though a custom that the lord shall have the best beast, &c., of his tenant who dies, is good, yet a custom or prescription to have a heriot of every stranger dying within such a manor is void; because it cannot have a reasonable commencement between the lord and a stranger, though it may between him and his tenants.

Dyer, 199 b; Dav. 33; 2 And. 153; Roll. Abr. 561.

So, a custom or prescription to have a heriot, viz. the best beast of his tenant, and if it be essoigned before the lord (b) seizes it, that then he may take the beast of any other person levant and couchant upon the land, is unreasonable and void.

Moore, 16, pl. 58, adjudged; N. Bendl. 112, pl. 147, adjudged; 4 Mod. 321, cited; Dyer, 199 b. (b) But the cattle of a stranger may be distrained, though not seized. N. Bendl. 302, pl. 294; Dals. 61; Owen, 146; March, 165, and vide *infra*, letter (C).

If the custom be, that the lord ought to have the best beast as a heriot of him that dies his tenant, and the parson of the parish the second best beast as a mortuary; if tenant hold two several tenements of the lord, subject to the custom, within the parish, the lord shall have the two best beasts, within the intent of the custom, and the parson the third.

7 II. 6, 26 b; Bro. tit. *Heriot*, 3 Bro. *Custom*, 22; Roll. Abr. 567, S. C.

A copyholder for life, where the custom is, that if the tenant die seised, a heriot shall be paid, dies disseised or ousted, the lord having first granted the seignory to A for 99 years, if the tenant should so long live, remainder to B for 4000 years; and herein two questions were made: 1st, Whether the heriot should be paid, because the copyholder did not die seised; and as to this, the court held clearly, that a heriot was due and payable; for notwithstanding the ouster and disseisin he still continued legal tenant, and such disseisin might have been by combination to defeat the lord of his heriot. The second question was (c), to whom the heriot should be paid; and as to this, the court held clearly, that the remainder-man for 4000 years could have no right to it, because the copyholder was never his tenant; and as to the grantee for 99 years, Barkley, Justice, was of opinion that it belonged to him; but hereof Jones, Justice, (they two only

(B) Of the several Kinds, &amp;c.

being in court,) doubted, because that *eo instante* the tenant died, *eodem instante* the estate of the grantee for 99 years was determined.

March, 23, Norrice v. Norrice; 2 Roll. Abr. 72, S. C. (c) That a heriot shall go with the reversion, Winch. 57, and always incident thereto, 2 Lutw. 1367.

If by the custom of a copyhold manor the lord may grant a copyhold to three persons, to hold to them *successivè sicut nominantur in chartâ et non alibi*, for their lives, and that on the death of every tenant the lord should have his best beast for a heriot, and a grant is made to J S and his assigns, to hold to him for his own life and the lives of two others; this at least is a good grant for the life of J S, though not strictly pursuant to the custom, and the lord on his death shall have a heriot; but he cannot have a heriot on the death of the *cestui que vies*, (a) because they were never his tenants.

Smartle v. Penhallow, 6 Mod. 63; Salk. 188, S. C.; Ld. Raym. 994, S. C. (a) So, where a bill was exhibited in Chancery to discover the best beast of *cestui que trust* of a college lease, and the defendant demurred thereto, because the best beast of *cestui que trust* could not be taken for a heriot; and also because it appeared by the plaintiff's own showing, that the tenants who had the estate in law in them were still living; the demurrer was allowed. Vern. 441. ¶ The demurrer in this case of Trinity college in Cambridge v. Brown, was *over-ruled*, and not, as here stated, *allowed*; and the case, as taken from the bill and answer by Mr. Raithby, was as follows. The bill stated, that the plaintiffs were seised of the manor and rectory of Shitlington, in Bedfordshire, with a court baron to the parsonage; that there were several tenants, who held their copyhold lands by fine uncertain, at the will of the lord, on death or alienation, and that paid heriots on the death of the tenants, whose lands were heriotable. It stated a surrender of a heriotable copyhold estate, 26th Feb. 1657, to defendants, Burgoyne and Gray, of Lincoln's Inn, their heirs and assigns, and their admission; that Sir Samuel Browne, one of the justices of C. B., was the real purchaser of the estate, and paid the purchase-money, and received the rents; and since his death, defendant Thomas Browne, his son and heir, enjoyed the estate, and also held freehold estates, for which he paid plaintiffs quit-rents. That Burgoyne and Gray were unknown to plaintiffs, and lived remote; and if they should die in remote parts, the homage could not present their deaths, and plaintiffs would lose a fine and heriots, as they had done by Sir Samuel Browne not dying seised, and their copyhold estate would by unity of possession be swallowed up in defendant Browne's freehold. And the bill asked what was the best chattel Sir Samuel Browne died possessed of, and prayed a commission to examine witnesses, and to perpetuate their testimony, that defendants Burgoyne and Gray might surrender the copyhold estate to defendant Browne, and on his admission the plaintiffs might be paid their fine due on the death of his father, and the heriot.

To this bill the defendant Browne put in an answer and demurrer. The answer was general as to so much as, &c., and admitted his father's purchase, and answered some other parts of the bill: and then followed the demurrer as to so much of the bill as sought a discovery of Sir Samuel Browne's best chattel, and prayed that Burgoyne, the surviving trustee, might surrender, &c., for that it appeared by plaintiffs' showing, they had always a tenant of the copyhold of their own admittance, and all fines, fees, and quit-rents had been duly paid, and neither Sir Samuel Browne, nor defendant, had ever been admitted tenant, and that by their own showing the custom of the plaintiffs' manor was, that heriots (if any due) were only payable after the deaths of the copyhold tenants. The demurrer was *over-ruled*. Reg. Lib. 1686, B. fol. 271.—But Lord Hardwicke refused to entertain a bill by the lord of a manor to discover whether a person claiming to be admitted as tenant was a trustee for another, and whether he was as capable to answer a heriot. Lord Montague v. Dudman, 2 Ves. 396. In the case of Wirty v. Pemberton, 2 Eq. Ca. Abr. 279, the lord of a manor being entitled to heriots from his freeholders upon every death or alienation, the tenants made long leases by which they barred him of his heriots; whereupon he preferred his bill against them to establish this custom. But by lord chancellor: Here does not appear to be any trust, and therefore I will not help the lord. I think the custom of heriots to be unreasonable: the loss which a family sustains being thereby aggravated; and equity never will interpose in such cases.¶

If a copyholder for life, on whose death the lord is entitled to a heriot, becomes a bankrupt, and the copyhold is assigned to the creditors, this trans-

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mutation of the tenant by act of parliament shall not work a prejudice to the lord; but the lord shall, on the death of the (a) copyholder, have a heriot.

Salk. 189. (a) But not on the death of the assignee, 2 Ld. Raym. 1002.

|| By special custom a heriot may be due on the death or avoidance of the head of a corporation.

Long Quint. E. 4, 72 b. Fitz. *Heriott*, pl. 7.

Upon the death of a widow, who was entitled to her free bench of a copyhold estate, or of a husband who had his curtesy in it, a heriot may be due to the lord; for in both cases the tenancy is of the lord; each of the tenants is by the act of the law.

Gilb. Ten. 172; Keilw. 84.||

If a heriot be due by *custom* of the manor, viz., that upon the death of every tenant of the manor the lord shall have a heriot; if the lord purchase parcel of the tenancy it shall not extinguish the custom, because the lord has only purchased part, and the tenant, on account of the residue, is still within the lord's homage, and tenant of his manor; and, consequently, upon his death, as upon the death of every other tenant of the manor, the lord is entitled to the heriot.

8 Co. 106; 2 Brownl. 296.

But, if the heriot were due by *tenure* or *heriot-service*, and the lord had purchased parcel of the tenancy, the whole heriot-service had been extinct; for being entire, it cannot, from the nature of the thing, be apportioned, and the tenant shall be discharged from the payment of it; for the whole tenancy being equally chargeable with the payment of such service, the lord by his own act shall not discharge part, and throw the whole burden upon the residue, for his own private benefit and advantage.

8 Co. 104; 6 Co. 1; Moor, 203; Co. Lit. 149 a.

If there be lord and tenant by fealty and heriot-service, and the tenant alien part of the tenancy, the alien shall hold by a distinct heriot-service; for in this case the services shall (b) be multiplied; and if after such alienation the lord purchase the residue of the tenancy, only the heriot-service due from the first tenant shall be extinguished; because by the alienation each held his proportion by a separate and distinct tenure; and therefore if the lord purchase one tenancy, that can no way affect the services of his other tenant.

But, if the lord, before the tenancy had been separated and holden by two distinct tenures, had purchased part of it, the whole heriot-service had been extinct, for the reasons above mentioned.

8 Co. 104; J. Talbot's case, Co. Lit. 149 b. (b) If the tenure be by homage, fealty, and a horse, hawk, or spur, if the tenant aliens part, the services shall multiply, and both feoffor and feoffee shall pay each of them a horse and a spur to the lord; but, if the tenure be by any corporal service, as to be butler to the lord, steward or bailiff of his manor, or to cover or repair his house, or to reap or thrash his corn; in all these cases upon alienation of part, such personal services shall not multiply. Co. Lit. 149; Bruerton's case, 6 Co. 1; Plow. 240 b. || In some manors, as in those of Mayfield and Framfield, in Sussex, only *one* heriot is due by custom, though the tenant die seised of several tenements. Kytch, 134 a.||

If by the custom of a manor every copyholder, upon his alienation and surrender, is to pay a heriot to the lord, and a copyholder surrenders part of his copyhold to one, and part to another, and retains part in his own hands, the heriots in this case shall be multiplied; and as to the first alienation, the heriot shall be paid by the copyholder who aliened, because he

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still continued tenant to the lord, and so upon the alienation of every other tenant *toties quoties*; for otherwise it might be in the power of the copyholder entirely to defeat the lord of his heriot.

Palm. 342, Snag v. Fox.

|| Where a copyhold estate was divided into two parts by a devise of it to two persons, as tenants in common, it was resolved, that each of the devisees was subject to the payment of a separate fine, and to a several heriot, and that if one of the two persons surrendered his moiety to the other, the estates notwithstanding continued several, and were subject to several heriots. For if an estate holden by indivisible services was divided and holden in severalty, and afterwards, by the act of the parties, came again into one hand, the services which were multiplied should continue to be payable, not as for one tenement, but for each portion respectively, that is, as for distinct tenements; for they did not become again, in respect of the lord, one tenement. This doctrine, it was ruled, was as applicable to an estate holden in common, as to estates holden in severalty.

Attree v. Scutt, 6 East, 476; 1 Cruise's Dig. 354.

The case of Attree v. Scutt, 6 East, 476, has been overruled by two subsequent cases, and it is now clearly settled that if a copyhold tenement is divided among several as *tenants in common*, a heriot is due from each during the severance, but if the portions are re-united again in one person, a single heriot only is then payable, for the creation of the tenancy in common does not destroy the entirety of the tenement. *Quære*, in case of an actual severance of the tenement into distinct and divided portions?

Garland v. Jekyll, 2 Bing. 273; Holloway v. Berkeley, 6 Barn. & C. 2.

Where a plea of justification in trespass for taking two horses as heriots, stated a custom in the manor, that the lord from time immemorial, until the division of a certain tenement into moieties, had been accustomed to take a heriot on the death of every tenant dying seised, and since the division the lord had taken and been accustomed to take on the death of every tenant dying seised of a moiety, a heriot for such moiety, this must be taken to be one entire custom, and not two distinct customs, the one applicable to the tenement before, and the other after the division; and being said to be an immemorial custom, it is disproved by evidence that the division was made within memory.

Kingsmill v. Bull, 9 East, 185.||

The dean and chapter of Worcester were seised of the manor of H in fee, in right of their church, of which manor one G was copyholder for life under the ancient rent of 8s. 8d. payable at the four quarter-days of the year, and heriotable at the death of the tenant, and the copyholds of that manor were grantable by custom for three lives; the dean and chapter by indenture under their common seal demise the said lands to G and his assigns, for the lives of A, B. and C, and the survivor of them, rendering 8s. 8d. half yearly, and without reservation of any heriot; and after this lease made, the dean dies, and his successor and the chapter enter to avoid this lease, upon the 13 Eliz. c. 10, (among other reasons) because the ancient rent was not reserved, by reason of the loss of the heriot: but the lease was adjudged good, and binding upon the successor. For the 13 Eliz. c. 10, does not avoid any lease, if the accustomed rent or more be reserved; and here the accustomed rent is reserved, and the omission or loss of the heriot is not material, because



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that was not a thing annual or depending upon the rent but perfectly casual and accidental.

Dean and Chapter of Worcester's case, 6 Co. 37; Baugh v. Haynes, Cro. Ja. 79; Banks v. Brown, Moore, 759; Co. Lit. 44 b; 6 Mod. 64, S. C. cited.

2. *Where a Heriot shall be said to be due by Tenure or Reservation.*

It has been already observed, that when the feud became inheritable the heriot was still continued by custom, or the lord reserved it as parcel of his tenure, and then he might either seize or distrain for the same as he might do for any other feudal service.

Plowd. 96; Bro. tit. *Heriot*, 2.

If a feme tenant by fealty, certain rent, and heriot-service, dies, leaving a husband tenant by the curtesy, the heriot becomes due by the death of the (a) wife, though the lord need not distrain for it till after the death of the husband; but, if he distrains for it after the death of the husband, it is not sufficient for him to allege seisin of the services by the hands of the tenant by the curtesy; for such seisin can no more bind the heir, than the seisin of any other tenant for life, who has nobody's estate but his own.

Keilw. 84, pl. 8. (a) But, by Dodderidge, it does not become due by the death of the wife, because the wife can have no property. 4 Leon. 239. || Keilw. 84 a, and b; 2 Bl. Comm. 424. But *qu.* where she has a *separate estate*.||

A man made a lease for 99 years, if A, B, and C should so long live, rendering a heriot after the death of each of them successively as they were all three named in the deed; the last named died first; and if a heriot should be paid, was the question. It was objected, that the reservation being upon the death of the three successively, the lessor was contented to trust to that contingency: but as to this point the court gave no opinion: but judgment was given against the avowant for other faults in the pleadings. Ingram v. Tothill; Mod. 216; 2 Mod. 93, S. C.

In covenant the plaintiff sets forth a lease made to the defendant for 99 years, if J and S should so long live, which lease was to commence after the end, forfeiture, surrender, or other determination of another lease for 99 years, if A and B did so long live, *et post principium inde reddendo et solvendo* 10*l.* rent *per ann.* and also one capon every Christmas, *ac etiam reddendo et solvendo* to the lord the chief rent, and also rendering and paying at the death of J or S, or either of them, 3*l.* in the name of a heriot, and also doing several days' work with his team at such days in the year as were therein appointed; the plaintiff saith that J is dead, and that S is living, and that the defendant according to his covenants hath not paid the 3*l.*, &c., and upon demurrer, the question was, whether the 3*l.* was payable before the lease took effect. Keeling, C. J., was of opinion, 1st, That the reservation being in lieu of the profits, the other reservations (though there had been no such thing expressed as *post principium inde*) must not have begun till the lease had come into possession. 2dly, That this 3*l.* is a sum in gross, and could not have been distrained for, being only an agreement of the parties that a sum of money should be paid at the death of J and S, or either of them, like an agreement to pay a fine; and being such an agreement, it shall be paid, though the lease never take effect; neither is it material what other reservations it comes in company with, for nobody shall make any interpretation of the express words of the party. But the other three judges were of opinion that the 3*l.* in the name of a heriot was not to be paid upon any death that fell out before the lease came into possession; for though it be appointed

(C) Of the Remedies to be pursued, &c.

to be paid after the death of J and S, or either of them, yet that must be understood *secundum subjectam materiam*, viz., if their death happen within the term; for till the former lease expire, this is a future interest, and then the lessor hath no reversion, and the lessee has no term; and how then can a heriot be payable? for a heriot by reservation is in the nature of a rent, and may be distrained for as well as a rent. 2dly, (a) Covenants must be expounded according to the intentions of the parties, which are to be collected from the nature of the grant on which they depend, and of other covenants which come in company with them; and therefore the reservation of 3*l.* in the name of a heriot being upon account of the term, and the term not being yet come *in esse*, and also being joined with other reservations, none of which were to begin till *post principium* of the term, this must have the same construction too, and must not commence before the term.

Longon v. Carne, 2 Saund. 161; Vent. 9, 91; Lev. 294; Sid. 437; 2 Keb. 677, S. C. (a) For this vide Hob. 275; Dyer, 371, pl. 5, 377, pl. 27; 10 Co. 107.

If to an avowry for heriot custom or service, the party pleads in bar, that the tenant at the time of his death *nulla habet animalia*; this, as to its being a good plea, is left a *quere* by Hobart and Hutton; though the latter book seems to hold it a good plea, and that it will bar the lord, especially, (b) if there was no fraudulent disposition to defeat the lord of his heriot; in which case he has his remedy by the force of the statute (c) 13 Eliz. c. 5, § 3.

Hob. 176; Hutt. 4, 5, Shaw v. Taylor. (b) The lord shall have his heriot, though the tenant devises away all his goods, Co. Lit. 158 b, || or bargains and sells his horses a short time before his death without consideration, for the purpose of defrauding the lord of his heriot. Dy. 351 b. || (c) An action brought on the statute by the lord against a person being party to a fraudulent disposition, in order to defeat a lord of his heriot. 2 Leon. 8.

(C) Of the Remedies to be pursued for the recovery of a Heriot when it is due.

It seems to have been always agreed, that for a *heriot-custom* the lord might seize the best beast of the tenant, or whatever else was due as a heriot, wherever he could find it.

Bro. tit. *Heriot*, 2, 3; Keilw. 82.

But according to some ancient opinions, the lord could only distrain, but not seize for a *heriot-service*; because, say they, it lies in *render*, and not *prender*; also the form of pleading is, that he was seised thereof by the hands of his tenant, which would be absurd, if the lord had such a property therein that he might seize it as his own.

Doctor and Student, Dialogue 2, c. 9; N. Bendl. 30, pl. 47; Keilw. 82.

But it hath been solemnly adjudged, that for a *heriot-service*, or for a *heriot* reserved by way of *tenure*, the lord may either seize or distrain; for when the tenant agrees that the lord shall on his death have his best beast, &c., the lord hath his election which beast he will take, and by seizing thereof reduces that to his possession, wherein he had a property at the death of the tenant, without the concurring act of any other person; and it is not like the case where the lessor reserves 20*s.* or a robe, for there the lessee hath his election which he will pay, and being to do the first act, the lord cannot seize, but must distrain.

Woodland v. Mantel, Plowd. 96, adjudged; Cro. Eliz. 589; Odiham v. Smith, S. P. adjudged in B. R. on a writ of error of a judgment to the contrary in C. B. Moor, 540, S. C., adjudged accordingly in B. R. on a conference with the judges of the court of C. B. And. 298, S. C. as adjudged in C. B.; Peter v. Knoll, Cr. El. 32.

Also, though the lord may either seize or distrain for a *heriot-service*, yet

(C) Of the Remedies to be pursued, &c.

he can only seize the (a) proper beast of the tenant; but he may (b) distrain any man's beasts which are upon the land, and retain them until the heriot be paid.

Major v. Brandwood, Cro. Car. 260. (a) This must be the very beast of the tenant. 3 Mod. 231. (b) For this vide Dals. 61; Owen, 146; March, 165; N. Bendl. 302, pl. 294; Lit. Rep. 35.

So, it hath been ruled, that for a heriot-custom or service the lord may seize as well out of the manor as in; (c) but if he distrains, it must be in the manor.

Austin v. Bennet, 1 Salk. 356; Parker v. Gage, 1 Show. 81; Major v. Brandwood, Cro. Car. 260; Sir W. Jon. 300, S. C.; Edwards v. Mosely, Willes's Rep. 192. (c) For a heriot-custom the lord may seize upon the highway, for that is no distress, but a seizure; but he cannot distrain for a heriot-service there. 2 Inst. 132.

But it is said, that this liberty must be understood to be annexed to ancient tenures, on which the lords had many privileges, and not to be extended to those which are created within time of memory, upon particular reservations; and (d) therefore where a lease was made of land for 99 years, if A and B should so long live, reserving a yearly rent and a heriot, or 40s. in lieu thereof, after the death of either of them; provided that no heriot should be paid after the death of A living B, and A and B were both dead, and, consequently, the lease (e) determined; the court was divided in opinion, whether the lessor could (g) distrain for the heriot or not.

(d) 2 Lutw. 1366; Osborne v. Steward, 3 Mod. 230; 2 Lutw. 1366, S. C. adjourned into Exchequer, *et vide* Mod. 217; 2 Mod. 93. (e) That after the determination of the lease the lessor cannot distrain. Co. Lit. 47; 6 Co. 64. But for this vide title *Rents*, and the statute of the 8 Ann. c. 14, § 6. (g) But he may have an action of debt or of covenant. Lawzon v. Carne, 2 Saund. 161.

If the tenure be by rent and heriot-service, viz., to have the best beast after the death of the tenant, and the lord distrain for the heriot, he need not in his avowry show which was the best beast which he was entitled to, nor what value it was: for the tenant might have essoigned the cattle, and thereby it might be impossible for the lord to know which was the best beast; and the tenant at his peril is to render the best beast or sufficient recompense.

Cro. Car. 260, Major v. Brandwood, adjudged, and two precedents cited to the same purpose. Jones, 300, S. C. adjudged, and the same precedents taken notice of; but there said, that there were divers precedents in which the best beast is precisely avowed, and this by the reporter is said to be the best way, when it can be known, though the other is sufficient:—But in Hob. 176, Shaw v. Taylor, for this incertainty in the avowry judgment was given against the lord. Hut. 4, S. C. and S. P.

If in replevin the defendant avows for a heriot upon a lease made by indenture to A, his executors and assigns, for 99 years, if the said A, B, and C, or any of them, should so long live, rendering rent, and rendering and paying after the death of the said A his *executors and assigns*, his or their best beast for a heriot, or 50s. at the election of the lessor, his heirs or assigns, and A assigns to J S and dies, on whom the lessor distrains; and upon oyer of the indenture it appears, that the clause for the heriot was *rendering and paying to the lessor, his heirs and assigns, after the death of the said A, B, and C, and every of them, his or their best beast in the name of a heriot, or 50s., &c.*; this variance is fatal; for though the lessor be entitled to a heriot, on the death of A, B, or C, yet he ought to have set it forth according to the indenture, and not to have avowed for a heriot after

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the death of *A*, *his executors and assigns* when there are no words which make a heriot payable on the death of the executors or assigns.

Cro. Car. 313, *Randal v. Scory*; but vide this case as reported in *Hetley*, 57, and 2 Roll. Abr. 451.

If a heriot be due by custom from every tenant dying seised, the lord need not allege what estate the tenant died seised of.

Bulst. 101, *Syliard's case*.

But, where a person would entitle himself as devisee of a reversion after a lease on which a heriot is reserved, he ought to show of what estate the deviser was seised at the time of making his will, and (a) that he died seised of such estate; for if disseised before his death, the will could not operate.

Cro. Eliz. 530; *Dyer*, 229; *Sid.* 265. (a) *Mod.* 217; 2 *Mod.* 93.

|| A seizure for heriot custom is not within the 11 G. 2, c. 19, § 22, as to costs; but a distress for heriot-service is within it, as it is also within 7 H. 8, c. 4, and 21 H. 8, c. 19.

*Lloyd v. Winton*, 2 Wils. 28; *Barnes*, 148, S. C.; *Haselip v. Chaplen*, Cr. El. 257, 329; *Mackworth v. Shipward*, Cro. Ja. 27.

In replevin as well as in trespass, if the defendant avows or justifies for heriot custom, he ought to allege the seisin of himself, and the tenant, the custom for a heriot, the death of the tenant, and seizure of the heriot.

Co. Entr. 613, a; *Baldwyn v. Noaks*, 2 Lutw. 1309.

It is not sufficient to allege a custom to take the best beast, without saying, *for a heriot*, or, *in the name of a heriot*.

Dy. 199, b. See *Parkin v. Radcliffe*, 1 Bos. & Pull. 282.||

## HIGHWAYS.

(A) Of the several Kinds, and what shall be said a Highway.

(B) To whom the Highway and Soil belong.

(C) Whether a Highway may be changed.

(D) Of stopping a Highway, and other Nuisances therein.

(E) Who are obliged to repair a Way by the Common Law: And herein where a Person shall be liable by reason of Enclosure, Tenure, or Prescription.

(F) Of the Provision for repairing the Highways by several Acts of Parliament.

(G) How the Parties obliged to repair are to be proceeded against, and what Defence they may make.

(H) Who hath a Right to a private Way, and how he may claim it.

(A) Of the several Kinds, and what shall be said a Highway.

It seems that (a) anciently there were but four (b) highways in England, which were free and common to all the king's subjects, and through which they might pass without any toll, unless there was a particular consideration for it; all others, which we have at this day, are supposed to have been

(A) Of the several Kinds, &amp;c.

made through private persons' grounds, on a writ of *ad quod damnum*, &c., which being an injury to the owner of the soil, it is (c) said that he may prescribe for toll without any special consideration.

(a) That without any reservation of tenure, &c., the *trinoda necessitas* lay upon all lands in England, viz.: Contributions against invasions, to the highways, and to bridges. (b) || These four highways, the work of the Romans, were Watlingstreat, Ikenildestreat, Fosse, and Erminstreat, *quorum duo*, say the laws of Edward the Confessor, c. 12, *in longitudinem regni, alii duo in latitudinem distenduntur*. They were put by those laws within the king's peace, *in pace regis*, a privilege which was confirmed to them by the Conqueror. See c. 30, of his laws. The lines underneath of Robert of Gloucester, from the MS. in the Bodleian Library, quoted by Dugdale in his *Antiquities of Warwickshire*, are curious, though the author was somewhat mistaken as to the exact line of the roads, and the makers of them. ||\* (c) James v. Johnson, 2 Mod. 143; Colson v. Smith, Cowp. 47.

There are, says my Lord Coke, at this day three kinds of ways: 1. A footway, called in Latin *iter*. 2. A pack and primeway, which is both a horse and footway, called in Latin *actus*. 3. A cartway, called in Latin *via* or *aditus*, which contains the other two, as well as a cartway, and is called *via regia*, (a) if it be common to all men; and *communis strata*, (b) if it belong only to some town or private person. (c)

Co. Lit. 56, a. (a) || So Ulpian, *Publicas vias dicimus, quas Græci Βασιλικας, nostri Prætorias, alii Consulares vias appellant.* || (b) [*Communis strata* and *alta via regia* are synonymous. 1 Str. 44.] (c) || This explanation of the three kinds of ways is not to be found in the books to which Lord Coke refers, namely, Bracton and Fleta. Bracton (lib. iv. c. 27) only says, "there are *iter*, *actus*, and *via*;" but adds not a word to explain the meaning of them, or the difference between them. Nor is any more to be collected from Fleta. These terms are borrowed from the Roman law, and their strict meaning in that law Lord Coke has pretty accurately explained. The student will not be displeased with a further explanation of them, which I extract from Faciolati's Dictionary, (voc. *Via*) *Differunt ITER, ACTUS, VIA, quod ITER hominis, ACTUS hominis et jumentis; VIA hominis, jumentis, et vehiculi: Unde consequitur, iter esse angustius actu, actum via. Nam angustiore spatio it homo, quam armentum, ac armentum angustius spatium requirit quam vehiculum. Iter duorum pedum latitudine definitur, quantum requiritur, ut transire possint occurrentes; actus est iter quatuor pedes latum, ut Festus scribit in voce "Actus."—At via latitudo leg. xii. tab. in porrectum pedes habet octo, in anfractum, id est, ubi flexum est, pedes duodecim. Hæc trium harumque vocum proprietas est, quando de servitute agrorum loquimur.* But *actus* in its more popular sense, and as used by Ulpian and others, is *jus agendi vel jumentum, vel vehiculum*. And so in the following lines, which are quoted in Du Cange, (voc. *Actus*):

*Est actus via quæ currus jumentaue ducit;  
Sed per iter, sine jumentis et curribus ibis.*

Does not this explanation of these terms, which must have been familiar to the English lawyers of former days, seem to countenance Mr. Justice Chambre's idea in Ballard v.

\* Faire weyes many on ther ben in Englonde,  
But four most of all ther ben I understonde,  
That thurgh an old kyng were made ere this,  
As men schal in this boke aftir here telle I wis.  
From the south into the north takith Ermingestrete,  
From the east into the west goeth Ikeneldstrete,  
From southwest to northwest, that is sum del grete,  
From Dover into Chestre goth Watlingstrete.  
The ferth of thise is most of alle that tilthe fram Toteneys,  
From the one end of Cornwaile anone to Cateneys,  
From the southwest to northeast into Englonde's end,  
Fosse men callith thiske voix that by mony town doth wende.  
Thise foure weyse on this londe King Belin the wise,  
Made and ordeyned hem with gret franchise:  
For whoso dide therein ony thefte othir ony wouze,  
He made juggement thereof and gref vengeance ynouze.

(A) Of the several Kinds, &amp;c.

Dyson, 1 Taunt. 287, that though a carriage-way may not necessarily include a driftway; yet it is *prima facie* evidence, and strong presumptive evidence of the grant of a driftway? || *β* See Pothier, Pandectæ, lib. 8, t. 7, § 1; Dig. 8, 3; 1 Bro. Civ. Law, 177; Ayliffe's Pand. 307.*g*

But, notwithstanding these distinctions, it seems that any of the said ways which is common to all the king's subjects, whether it directly lead to a market town, or only from town to (*a*) town, may properly be called a highway, and that any such cartway may be called the king's highway; and that a river (*b*) common to all men may also be called a highway; and the nuisances in any of the said ways are punishable by indictment; for otherwise they would not be punished at all; for they are not actionable unless they cause a special damage to some particular person; because if such action would lie, a multiplicity of suits would ensue. But it seems that as way to a parish church, or to the common field of a town, or to a village, which terminates there, may be called a private way (*c*), because it belongs not to all the king's subjects, but only to the particular inhabitants of such parish, house, or village, each of which, as it seems, may have an action for a nuisance therein.

|| Palm. 389; Madox's case, Cro. El. 63; Fineux v. Hovenden, Ibid. 664; Katherine Austin's case, 1 Ventr. 189; Thrower's case, Ibid. 208; Reg. v. Saintiff, 6 Mod. 255; 1 Salk. 359, S. C.; 2 Ld. Raym. 1174, S. C. (*a*) The ancient form of indictment always showed both the *termini* of a public highway; because if the way did not reach from town to town, it was not a highway. *Qu.* Whether a street which is no thoroughfare, can be deemed a public highway. See 5 Taunt. 140. *β* In common parlance the word street is equivalent to highway. 4 S. & R. 108; see Conner v. the President and Trustees of New Albany, 1 Blackf. 44.*g* (*b*) [So, Callis compares a navigable river to a highway; but *per* Buller, J., no two cases can be more distinct. For, in the latter case, if the way be foundrous and out of repair, the public have a right to go on the adjoining land: but if a river should happen to be choked up with mud, that would not give the public a right to cut another passage through the adjoining lands, 3 T. R. 206. The public have no common-law right to tow upon the banks of navigable rivers. Ball v. Herbert, 3 T. R. 253. (*c*) But a highway may be described as leading from a hamlet. 4 Burr. 2091. It is unnecessary, indeed, particularly to describe a highway, for, as Lord Hale saith, whether it be such or not depends much upon reputation. 1 H. Bl. 355.]

|| The number of persons therefore who may be entitled to use the way, or obliged to repair it, will not make it a public way, if it be not common to *all* the king's subjects; nor will the circumstance of its having been set out under a public act of parliament make the non-repair of it an indictable offence.

R. v. Richards, 8 T. R. 634. ||

If passengers have used, time out of mind, when the roads are bad, to go by outlets on the land adjoining to a highway in an open field, such outlets are parcel of the highway; and therefore, though they be sown with corn, if the track be foundrous, the king's subjects may go upon the corn.

Sir Edward Duncomb's case, Roll. Abr. 390; Cro. Car. 366, S. C. *β* Unenclosed land adjoining a public highway is considered as dedicated to public use, and the owner of such land cannot maintain an action against any person travelling over it. Cleaveland v. Cleaveland, 12 Wend. 172.*g*

|| Whenever a common highway is so foundrous and out of repair as to become impassable, or dangerous to be travelled over, the public have a right to go on the adjoining ground.

Absor v. French, 2 Show. 28; Taylor v. Whitehead, Dougl. 749; Henn's case, Sir W. Jon. 296.

A way may become a public highway by a dedication of it by the owner

(A) Of the several Kinds, &amp;c.

of the soil to the public use. As, where the owners of the soil suffered the public to have the free passage of a street in London, though not a thoroughfare, for eight years, without any impediment, (such as a bar across the street, and shut at pleasure, which would show the limited right of the public,) it was holden to be a sufficient time for presuming a dereliction of the way to the public. And though if the land had been under lease during that time, or even for a much longer period, the acquiescence of the tenant would not, it seems, have bound the landlord without evidence of his knowledge: yet it has been holden, that where a way has been used by the public for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord, and a dedication by him to the public may be presumed, although he was never in the actual possession of the close himself, and is not proved to have been near the spot. And where a way has been so used, notice of the fact to the steward is notice to the landlord. In a case where it appeared that a passage, leading from one part to another of a public street (though by a very circuitous route) made originally for private convenience, had been open to the public for a great number of years, without any bar or chain across it, and without any interruption having been given to persons passing through it, it was ruled that this must be considered as a way dedicated to the public. But the erection of a bar to prevent the passing of carriages rebuts such a presumption, although the bar may have been long broken down. And although the bar do not impede the passing of persons on foot, no public right to a footway is acquired, as there can be no partial abandonment to the public. And it has been ruled, that the owner of the soil may replace the bar after it has been taken away for twelve years. But in all these cases the presumption of a dedication of the way to the public use must depend upon facts; it is a mere question of evidence. Thus, where the plaintiff built a street leading out of a highway across his own close and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street for twenty-one years, during nineteen of which the houses were completed, and the street publicly watched, cleansed, and lighted, and both footways and half the horseway paved at the expense of the inhabitants; it was holden, (*Chambre, J. dissent.*) that the street was not so dedicated to the public, that the defendant, pulling down his wall, might enter it at the end adjoining to his land, and use it as a highway. In an earlier case, on an information for stopping up a common footway, the prosecutor proved, that it had been a common passage under the defendant's house as far back as any witness could remember: but the defendant producing a lease made for fifty-six years of this way, to the intent it might be a passage during the term, and the term expiring in 1728, Lord C. J. Raymond held the defendant not guilty; and as to the leaving it open since, he said that would not be long enough (*a*) to amount to a gift of it to the public.

1 Russell on Crimes, &c. 450; Trustees of the Rugby Charity v. Merreweather, 11 East, 375. See the observations of Mansfield, C. J., on this case, in 5 Taunt. 142. Ibid. *β* A road used as a public highway for twenty years next preceding the 21st of March, 1797, becomes a public highway though not recorded; and it does not cease to be a public highway, though originally leading to a dock and landing or ferry, and such ferry has been changed, and though some part of the way has been appropriated and built upon, if the passage continues open to the same dock and landing. Gallatin v. Gardner, 7 Johns. 406. *g* R. v. Barr, 4 Campb. N. P. 16; R. v. Lloyd, 1 Campb. N. P. 260; Roberts v. Karr, *cor.* Heath, J., Ibid. 262, n.; Lethbridge v. Winter, Ibid.; Wood-  
yer v. Hadden, 5 Taunt. 125; R. v. Hudson, 2 Str. 909. (*a*) About four years. *β* *A*

## (B) To whom the Highway and Soil belong.

road used as such for forty years, and repaired, is to be considered as a public road regularly laid out, though no record be found. *Ward v. Folly*, 2 South. 585. See *Arnold v. Flattery*, 5 Ohio, 273. There is no particular form or ceremony requisite in dedication of lands for public use; 9 Lo. R. 153, such dedication may be express or implied. 2 Pet. 566; 12 Wheat. 585; 11 East, 376; 3 Kent. Com. 450.*g*

β The general authority given by the statutes to the sessions to lay out highways, cannot be extended to laying out a public highway over a navigable river, whether the water be fresh or salt, so as to obstruct it by a bridge.

*Commonwealth v. Coombs*, 2 Mass. 489.

A grant made by the proprietors of land to a town, of all the proprietor's ways called highways, conveys only such ways as are in existence at that time, and not such as the proprietors reserved a right to lay out.

*Borden v. Manchester*, 4 Mason, 112.*g*

|| Where the *locus in quo* in trespass was a *cul de sac*, called Little Abingdon Street, which for ninety-nine years, ending in 1818, had been in lease to tenants, and as far as memory went back had always been used by the public, and lighted, and watched, and paved under an act of parliament, in which it was enumerated as one of the streets of Westminster, and the plaintiff in 1820 first stopped it up; it was held, the jury was justified in finding that there was no public way, since, during the ninety-nine years, there could be no dedication to the public, which could only be by the owners of the fee.—*Qu.* Whether there can be a public way, which is not a thoroughfare?

*Wood v. Veal*, 5 Barn. & A. 454. *Sed vide* *Rex v. Barr*, 4 Camp. 16; and *per* *Le Blanc, J.*, 11 East, 375.

Where a road was set out by commissioners under a local act, and certain persons only were by the act to use it, but in fact it had been used by the public many years, this was held not sufficient evidence of a dedication to the public, and that if it was, there being no evidence that the parish had acquiesced in the dedication, it was not a public road which the parish were bound to repair.

*Rex v. St. Benedict*, 4 Barn. & A. 447.

Where a land-owner suffered the public to use for several years a road through his estate for all purposes except that of carrying coals, it was held that this was either a partial dedication to the public, (which it seems may legally be,) or no dedication at all, but only a license revocable, and that a person carrying coals along the road after notice not to do so was a trespasser.

*Marquis of Stafford v. Coyney*, 7 Barn. & C. 257.

## (B) To whom the Highway and Soil belong.

THOUGH every highway is said to be the king's, yet this must be understood so, as that in every highway the king and his subjects may pass and repass at their pleasure.

2 E. 4, 9; Roll. Abr. 392.

But the freehold, and all the profits, as trees, &c., belong to the (a) lord of the soil, or to the owner of the lands on both sides the way.

Roll. Abr. 392. β The right of passage belongs to the public, but the title to the soil, stone, wood, or grass thereon, continues in the owner of the land. *Chambers v. Furrey*, 1 Yeates, 167; *Cartelyon v. Van Brundt*, 2 Johns. 357; *Perley v. Chandler*, 6 Mass. 454; *Stackpole v. Healy*, 16 Mass. 33; *Buel v. Clark*, 1 Root, 49; *Jackson v.*



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Hathaway, 15 Johns. 447; *Bolling v. Mayor et al.*, 3 Rand. 563; *United States v. Harris*, 2 Sumn. 21; *Harris v. Elliott*, 9 Pet. 25; *Hooker v. Utica, &c. Co.* 12 Wend. 371; *Gidney v. Earle*, 12 Wend. 98; *Lambert v. Heke*, 14 Johns. 483.—In Louisiana the right of soil in public roads is vested in the public, and such road cannot be considered as a mere servitude or right of way due by the proprietor of the adjoining land. *Renthorp v. Bourg*, 4 Mart. R. 136.*g*—(a) If trees grow upon the highway, he to whom the seignior of the leet of the same place doth belong shall have the trees. Roll. Abr. 392. *β* The public cannot lawfully use and occupy the soil of an individual adjoining navigable waters, as a public landing and place of deposit of property in transitus, against the will of the owner, although such uses have been continued more than twenty years. Such uses cannot be urged by the public, either as the foundation of a legal presumption of a grant, and thus justify a claim by prescription, or as evidence of a dedication to public use. *Pearsall v. Post*, 20 Wend. 111. See *Cooper v. Smith*, 9 S. & R. 32; *Chambers v. Furrey*, 1 Yeates, 167.*g*

Also, the lord or owner of the soil shall have an action of trespass for digging the ground; || and may recover it (a) in ejectment.||

8 E. 4, 9; Roll. Abr. 392; *Sir John Lade v. Shepherd*, 2 Str. 1004, *acc.* (b) *Goodtitle v. Alker*, 1 Burr. 133.

But the lord of a rape, within which there are ten hundreds, may prescribe to have all the trees growing within any highway within this rape, though the manor or soil adjoining belongs to another: for usage to take the trees is a good badge of ownership.

Roll. Abr. 392; *Brownl. 42*; *Keilw. 141.* *β Quære*, whether the fee of a highway is in the proprietors of the adjoining lands. *Stiles v. Curtis*, 4 Day, Cus. 328.*g*

||Although the presumption is, that a strip of land lying between a highway and the adjoining enclosure, is, as well as the soil of the highway, *ad medium filum vie*, the property of the owner of the enclosure; yet, if the strip of land communicates with open commons or other large portions of land, the presumption is either done away, or considerably narrowed; for the evidence of ownership, which applies to the larger portions, applies also to the strip of land which communicates with them.

*Grose v. West*, 7 Taunt. 39.||

*β* The proprietors of land adjoining a highway, *prima facie* at least, have a fee in such highway, *ad medium filum vie*. (b) But though the presumption is that their rights are equal, each owning to the centre, yet this rule is only a presumption that they originally owned the land taken equally; when it appears that one was the proprietor of the whole, or a greater part of the land, the presumption ceases. (c)

(b) *Chatham v. Brainerd*, 11 Conn. 60; *Cooke v. Green*, 11 Price, 736; *Doe d. Pring v. Pearsey*, 7 B. & C. 304. (c) *Watrous v. Southworth*, 5 Conn. 305.

The legislature, in taking private property for public use, as for a public highway, is not restricted to a mere easement of the property, but may take the entire interest of the individual, if the public exigency requires it.

*R. & G. Rail R. Company v. Davis*, 2 Dev. & Bat. 451.*g*

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AN ancient highway cannot be changed without an inquisition found on a writ of *ad quod damnum*, (d) that such change will be no prejudice to the public. And it is said, that if one change a highway without such authority, he may stop the new way whenever he pleases. Neither can the king's subjects, in an action brought against them for going over such new way, justify generally as in a common highway, but ought to show specially, by way of excuse, how the old way was obstructed, and a new one set out.

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Neither are the inhabitants bound to keep watch in such new way, or to repair it, or to make amends for a robbery committed in it.

Cro. Car. 266 ; Vaugh. 341 ; Yelv. 141 ; Hawk. P. C. c. 76. (d) [A private act of parliament for enclosing lands, which vests a power in commissioners to set out new roads by their award, is equally binding with a writ of *ad quod damnum*. R. v. Flecknow, 1 Burr. 465.]

But it hath been holden, that if a water, which hath been an ancient highway, by degrees changes its course, and goes over different ground from that whereon it is used to run, yet the highway continues in the new channel in the same manner as in the old.

22 Ass. 93 ; Roll. Abr. 390.

|| By st. 13 Geo. 3, c. 78, a power was given to the justices of peace to widen, divert, and change highways, as they should judge most convenient. This power was given in aid of the common law, and in order to make the changing of highways less troublesome and expensive.

Russ. on Crimes, &c., 353.

This statute enacts, § 15, that the surveyor shall make every public cartway, leading to any market-town, twenty feet wide at the least ; and every public horseway or driftway eight feet wide at the least, if the ground between the fences enclosing the same will admit thereof. And where it shall appear, upon the view of two justices, that any highway between the fences is not of sufficient breadth, and may be conveniently widened and enlarged, or that the same cannot be conveniently enlarged and made commodious for travellers without diverting and turning the same, the said justices shall order such highway to be widened and enlarged, or diverted and turned, in such manner as they shall think fit, so that the said highway, when enlarged and diverted, shall not exceed thirty feet in breadth ; and that neither of the said powers do extend to pull down any house or building, or to take away the ground of any garden, park, paddock, court, or yard. The statute then empowers the surveyors to agree with the owners of the ground wanted for such purposes, for their recompense, and provides, that if they cannot agree, the same may be assessed by a jury at the quarter sessions ; and after directing the course of proceeding in such event, it enacts, that “upon payment or tender of the money so to be awarded and assessed, to the person or persons, bodies politic or corporate, entitled to receive the same, or leaving it in the hands of the clerk of the peace of such limit, in case such person, &c., cannot be found, or shall refuse to accept the same, for the use of the owner of or others interested in the said ground, shall be for ever divested out of them ; and the said ground, after such agreement or verdict as aforesaid, shall be esteemed and taken to be a public highway to all intents and purposes whatsoever.” When such new highway is made, the old highway is to be stopped up, and the land thereof sold by the surveyor in the manner directed by the act. But, if such old road shall lead to any place which cannot, in the opinion of the justices, be accommodated with a convenient way or passage from the new highway, then the old highway is only to be sold, subject to the right of way and passage to such place.

Russ. on Crimes, &c., 453.

The nineteenth section of this statute then enacted, that highways, bridleways, and footways, might be turned by the justices at their special sessions, with the consent of the owners of the lands, so as to make them nearer and more convenient to the public ; and provided for an appeal to the quarter sessions by persons injured by any such proceeding, or by the enclosure of

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any road by an inquisition on a writ of *ad quod damnum*. But this part of the section is repealed by st. 55 G. 3, c. 68, which recites, that it was expedient that more public notice should be given of any order or proceeding for diverting or stopping any such ways; and also that a greater facility of appeal to the quarter sessions against such order or proceeding should be given to any person aggrieved thereby; and also that the justices have power, under certain regulations, to stop unnecessary highways, bridleways, and footways.

For these purposes therefore it enacts, by § 2, "That when it shall appear, upon the view of any two or more of the said justices of the peace, that any public highway, or public bridleway or footway, may be diverted, so as to make the same nearer or more commodious to the public, and the owner or owners of the lands and grounds through which such new highway, bridleway, or footway so proposed to be made, shall consent thereto, by writing under his or their hand and seal, or hands and seals, it shall and may be lawful, by order of such justices at some special sessions, to divert and turn and to stop up such footway, and to divert, turn, stop up, and enclose, sell, and dispose of such old highway or bridleway, and to purchase the ground and soil for such new highway, bridleway, or footway, by such ways and means, and subject to such exceptions and conditions in all respects, as in the said recited act mentioned with regard to highways to be widened or diverted; and also when it shall appear, upon the view of any two or more of the said justices of the peace, that any public highway, bridleway, or footway is unnecessary, it shall and may be lawful, by order of such justices, or any two of them, to stop up and to sell and dispose of such unnecessary highway, bridleway, or footway, by such ways and means, and subject to such exceptions and conditions in all respects, as in the said recited act is mentioned in regard to highways to be widened and diverted; except that the money to arise from such sale, where by the said act it would be applicable to the purchase of the ground and soil of the new highways or bridleways therein mentioned, shall be paid to the surveyor or surveyors, and be applied towards the general repairs of the highways and bridleways of the parish, township, or place within which the said highway, bridleway, or footway so stopped up shall be situate: Provided that, in the several cases before mentioned, a notice, in the form or to the effect of the first schedule to this act annexed, shall be affixed in legible characters at the place and by the side of the said highway, bridleway, or footway from whence the same is directed to be turned, diverted, or stopped up, and also inserted in one or more newspaper or newspapers published or generally circulated in the county where the parish, township, or place in which the highway, bridleway, or footway so ordered to be diverted and turned or stopped up (as the case may be) shall lie (or in case no such newspaper shall be so published or circulated in such county, then in any newspaper or newspapers published or circulated in the nearest adjoining county), for three successive weeks after the making of such order; and a like notice shall be affixed to the door of the church or chapel of every parish or township in which such highway, bridleway, or footway so ordered to be diverted, turned, or stopped up, or any part thereof, shall lie, on three successive Sundays subsequent to the making of such order; and the said several notices having been so published, the said order shall, at the quarter sessions which shall be holden within the limit where the highway, bridleway, or footway so diverted and turned or stopped up shall lie, next

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after the expiration of four weeks from the first day on which such notices shall have been published as aforesaid, be returned to the clerk of the peace in open court, and lodged with him; and the said order shall at such quarter sessions be confirmed, and by the clerk of the peace enrolled amongst the records of the said court of quarter sessions."

§ 3. "Provided, that where any such highway, bridleway, or footway shall be so ordered to be stopped up or enclosed, and such new highway, bridleway, or footway set out and appropriated in lieu thereof as aforesaid, or where any unnecessary highway, bridleway, or footway shall be so ordered to be stopped up as aforesaid, it shall and may be lawful for any person or persons injured or aggrieved by any such order or proceeding, or by the enclosure of any road or highway, by virtue of any inquisition taken upon any writ of *ad quod damnum*, to make his or their complaint thereof by appeal to the justices of the peace at the said quarter sessions, upon giving ten days' notice in writing of such appeal to the surveyor of the highways of the parish, township, or place wherein such highway, bridleway, or footway shall be situated, and also affixing such notice to the door of the church or chapel of such parish, township, or place; and the said court of quarter sessions is hereby authorized and empowered to hear and finally determine such appeal."

§ 4. "Provided, that if no such appeal be made, or being made, such order and proceedings shall be confirmed by the said court, the said enclosures may be made, and the said ways stopped, and the proceedings thereupon shall be binding and conclusive to all persons whomsoever; and the new highways, bridleways, and footways so to be appropriated and set out, shall be and for ever after continue a public highway, bridleway, or footway, to all intents and purposes whatsoever; but no enclosures of such old highways, bridleways, or footways (except in the case of stopping up of such useless highways, bridleways, or footways as hereinbefore is mentioned) shall be made until such new highway, bridleway, or footway shall be completed and put into good condition and repair, and so certified by two justices of the peace upon view thereof; which certificate shall be returned to the clerk of the peace, and by him enrolled amongst the records of the court of quarter sessions next after such order as aforesaid shall have been confirmed or enrolled pursuant to the directions hereinbefore contained; but from and after the enrollment of such order and certificate, such old highway, bridleway, or footway shall be stopped up, and the soil of such old highway or bridleway sold, in the manner and subject to the reservations and restrictions in the said recited act mentioned with respect to highways to be diverted by virtue of the said recited act."

§ 5. "Provided, that this act, or any thing herein contained, shall not, and shall not be construed, to annul, or in any way affect or impeach any order or proceeding for the diverting or stopping up any highway, bridleway, or footway, made or had previous to the day of the passing of this act, but such order and proceedings may be proceeded in and completed in the same manner, and shall be valid and binding on all persons whatsoever to all intents and purposes, as if this act had not been made; any thing hereinbefore contained to the contrary notwithstanding."

Where one side of a highway is situated in one parish, and the other side in another parish, it is provided by 34 G. 3, c. 64, that two justices, upon application by the surveyor, may divide the whole of it by a transverse line crossing it, into two equal parts, or into two such unequal parts and

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proportions as in consideration of the soil, waters, floods, the inequality of such highway, or any other circumstances, they think fit.

An order under the act of 13 G. 3, c. 78, to stop up an old way, and set out a new one, must follow the form prescribed in the schedule annexed to the act, and set forth the length and breadth of the new way, otherwise it is no answer to a justification of a right of way pleaded to an action of trespass *quare clausum fregit* brought by the owner of the soil over which the old way led. The statute requires that the form set forth in the schedule "*shall* be used on all occasions with such additions and variations only as may be necessary to adapt it to the particular exigency of the case:" under which words a material variance from the form prescribed is fatal, and may be taken advantage of in a collateral proceeding.

Davison v. Gill, 1 East, 64.

That branch of the 19th section of 13 G. 3, c. 78, which directs, that "when any highway hath been diverted above twelve months, &c., if a new highway *hath been* made in lieu thereof, &c., and the same *hath been* acquiesced in, &c., every such new highway shall from *henceforth* be the public highway," is retrospective only, and, consequently, does not extend to highways diverted since that act.

Waite v. Smith, 8 T. R. 133.

It was determined upon § 19, of 13 G. 3, c. 78, (and the clause in the 55 G. 3, c. 68, is nearly the same,) that if the orders and certificates of the magistrates were delivered to the magistrates to be enrolled, the statute was satisfied, although the clerk of the peace made no transcript thereof, the statute being only directory to the officer as to the enrollment; and it was doubted whether the statute intended that a transcript should be made. And as the statute of 13 G. 3, c. 78, did not prescribe any particular form of certificate by the magistrates of the new road being complete and in good condition and repair, previously to the stopping up of the old road, it seems to have been thought, that a recital that they had so certified, contained either in the order for diverting the road, or in the order for stopping up the old road, was a sufficient certificate within the nineteenth section.

De Ponthieu v. Pennyfeather, 5 Taunt. 634.

It is not necessary for stopping up a road, that the magistrates should by their order substitute a new road reaching the whole distance from the *terminus a quo* to the *terminus ad quem*: it is sufficient if they set out a new road leading from the *terminus a quo* into a public highway, along which and other highways connected with it the subject may pass to the *terminus ad quem*.

De Ponthieu v. Pennyfeather, 5 Taunt. 634. β An alteration in a way is in law a discontinuance of the part altered. Commonwealth v. Inhabitants of Westborough, 3 Mass. 406.

The legislature may authorize the laying out of a common public highway over a road made by a turnpike corporation, and the taxing the franchise of the corporation for the purpose, notwithstanding the charter of the corporation is still in force, and the corporation is in possession of the road constructed by virtue of the authority given to the corporation, provided compensation be made for the property thus taken for public use.

Barber v. Andover, 8 N. H. Rep. 398.

In an appeal against an enclosure of a highway, by virtue of a writ of  
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*ad quod damnum*, the notices required above by the act of 52 G. 3, c. 68, must be given; a notice to a party interested is not alone sufficient.

R. v. Justices of Essex, 1 Barnw. & Ald. 373.

Under the 13 G. 3, c. 78, it was holden, that a new highway must be set out before an old one can be stopped up; and if it be not, the legality of the orders of the justices for diverting the old road and stopping it up, might be questioned in an action of trespass, notwithstanding such orders were confirmed by the session on appeal, stating the fact of a new road being set out instead of the old one. It is not sufficient that another old highway was widened in parts to answer the purpose of a new road.

Welch v. Nash, 8 East, 394.

The act requires that the power to set out a new road, and the power to stop the old road, shall be executed simultaneously, and by the same justices; and not at different times, and by different magistrates.

Page v. Howard, Cald. 228.

If two justices make an order for diverting and turning a public footway, and afterwards an order for stopping up the old footway, the party grieved may appeal to the quarter sessions against the last order, though too late to appeal against the first.

Rex v. Hertfordshire Justices, 3 Maule & S. 459.

An order for stopping up an unnecessary highway under 55 G. 3, c. 68, § 2, must be made at a special sessions, and that fact must appear on the face of the order.

Rex v. Shepherd, 3 Barn. & A. 414. As to the convening, &c., of the special sessions, see Rex v. Justices of Surry, 5 Barn. & C. 241; Rex v. Justices of Suffolk, 6 Barn. & C. 110.

It must appear on the face of the order for turning a road through a party's land, that the consent of the owner, at the time the order was made, was given in writing, &c., according to 55 G. 3, c. 68, § 2. An assent under the hand and seal of an agent is insufficient.

Rex v. Kirk, 1 Barn. & C. 21; Rex v. Kent (Justices,) 1 Barn. & C. 622. As to the notices of appeal against an order for diverting a highway, see Rex v. Townsend, 5 Barn. & A. 420; Rex v. Wing, 4 Barn. & C. 184; Rex v. Kent (Justices,) 1 Barn. & C. 622; Rex v. West Riding of Yorkshire (Justices,) 7 Barn. & C. 678. And as to diversion of highways, see Rex v. Justices of Worcestershire, 8 Barn. & C. 254; Rex v. Winter, *Ibid.* 785; and see further *Welbeloved on Highways*, chap. v.; Rex v. Justices of Kent, 10 Barn. & C. 477; *Allnutt v. Pott*, 1 Barn. & Adol. 302.

The exception in the general Turnpike act, 3 G. 4, c. 126, § 86, does not take away from the trustees the power of stopping up the roads therein mentioned, but leaves it at their discretion to do so or not, and, therefore, the trustees may stop and give to the owner of adjoining land an old road leading to a church, to which the new road does not immediately lead.

De Beauvoir v. Welch, 7 Barn. & C. 266.¶

(D) Of stopping a Highway, and other Nuisances therein.

It is clearly agreed to be a nuisance to dig a ditch, or make a hedge overthwart the highway, or to erect a new gate, or to lay logs of timber in it, or, generally, to do any other act which will render it less commodious.

Kitchen, 34; Hawk. P. C. c. 76, § 48. β A public thoroughfare was stopped, whereby the plaintiff, a bookseller, whose shop was in the thoroughfare, suffered a loss of custom: held sufficient special damages to entitle him to his special action on the case. *Wilkes v. Hungerford Market Company*, 2 Scott, 416; 1 Hodges, 281; 2 Bing. N. R. 281.¶

## (D) Of stopping a Highway, &amp;c.

Also, it is a nuisance for an heir, for which he may be indicted, to continue an encroachment, or other nuisance to a highway, begun by his ancestor; because such a continuance thereof amounts in the judgment of law to a new nuisance.

Hawk. P. C. c. 76, § 61.

Also, it is agreed, that it is no excuse for him who lays logs in the highway, that he laid them only here and there, so that the people might have a passage through them by windings and turnings.

2 Roll. Abr. 137; Hawk. P. C. c. 76, § 49. || But a man cannot support an action for an injury received by an obstruction in a road, even by the fault of the defendant, if by taking ordinary care he might have avoided the obstruction. *Butterfield v. Forrester*, 11 East, 60.

So, where a waggoner had occupied one side of a public street in a city before his warehouses in loading and unloading his wagons for several hours together both day and night, and had one wagon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying on the ground on the same side ready for loading; it was holden, that this was a public nuisance for which he was indictable, although there were room for two carriages to pass on the opposite side of the street.

*R. v. Russell*, 6 East, 427. ||

It is a nuisance to suffer the highway to be incommoded by reason of the foulness, &c., of the adjoining ditches, or by boughs of trees hanging over it, &c.; and it is said, that the owner of land next adjoining to the highway, ought of common right to scour his ditches; but that the owner of land, next adjoining to such land, is not bound by the common law so to do, without a special prescription. Also, it is said, that the owner of trees, hanging over a highway, to the annoyance of travellers, is bound by the common law to lop them; and it is clear that any other person may lop them, so far as to avoid the nuisance.

8 H. 7, 5 a; *Kitchen*, 34; *Dalt. c. 26*; Hawk. P. C. c. 76, § 52; § 1 Bos. & Pull. 17. §

{A bridge built by individuals in a highway without public utility is indictable as a nuisance. And so it is, though of public utility, if they build it at first in a slight and imperfect manner, for the purpose of throwing the expense of maintaining it entirely on the county.

2 East, 342, *The King v. Inh. of West Riding of Yorkshire*.}

But it is no nuisance for an inhabitant of a town to unlade billets, &c., in the street before his house, by reason of the necessity of the case, unless he suffer them to continue there an unreasonable time.

2 Roll. Abr. 137. § *Commonwealth v. Passmore*, 1 S. & R. 219. The government of every incorporated town has a right to improve the streets for public purposes, whether as highways or places for cisterns or wells. *Barter v. The Commonwealth*, 3 Penns. 257. §

|| But every unauthorized obstruction of the king's highway to the annoyance of his subjects is indictable as a nuisance. A timber merchant therefore shall not cut his logs in the street adjoining to his timber yard; though he may not be able otherwise to get them into his yard, or to carry on his business there. He shall not eke out the inconvenience of his own premises by taking in the public highway: and if the street be narrow, he must remove to a more commodious situation for carrying on his business. Nor shall stage coaches stand plying for passengers in the public streets.

*R. v. Jones*, 3 Camp. N. P. 230; *R. v. Cross*. Ibid. 224. But it hath been ruled,

(E) Who are obliged to repair a Way, &c.

that an indictment will not lie for setting a person on the footway in a street to distribute handbills, whereby the way was obstructed. *R. v. Sarmon*, 1 Burr. 516.¶

Any one may justify pulling down, or otherwise destroying, a common nuisance, as a new gate or house erected in a highway. And it hath been of late holden, that there is no need, in pleading such justification, to show that as little damage was done as might be.

2 Roll. Abr. 144; *Cro. Car.* 184; *Jon.* 221; 2 Salk. 458.

Also, besides that all nuisances are punishable by indictment with fine and imprisonment, it is said, that one convicted of a nuisance to the highway, may be commanded by the judgment to remove it at his own costs, &c.

2 Roll. Abr. 84; *Hawk. P. C. c.* 75, § 14. Vide 1 Str. 686.

¶ It is sufficient as well in an indictment or presentment for a nuisance in a highway, as in a plea in trespass justifying under a right of way, to allege that it is a highway, without stating how it became such, or that it has immemorially been so.

*Aspindall v. Brown*, 3 T. R. 265; 6 T. R. 608, S. P.

In a presentment for such a nuisance under the st. 13 G. 3, c. 78 § 24, the offence must be alleged to be done against the form of the statute; for it is presentable by the magistrate only as an offence against the act.

*R. v. Winter*, 13 East, 258.¶

(F) Who are obliged to repair a Way by the Common Law: And herein, where a Person shall be liable by reason of Enclosure, Tenure, or Prescription.

Of common right, the general charge of repairing highways lies on the (a) occupiers of lands in the parish wherein they lie; but it is said, that the tenants of the lands adjoining are bound to scour their ditches.

*Roll. Abr.* 390; *March*, 26; *Vent.* 90, 183; 8 H. 7, 5. (a) But, if there be no occupier, by the owner's letting the lands lie fresh, he must repair them himself. 2 *Roll. Rep.* 412; *Palm.* 389.

Also, if a parish is part in one county and part in another, and the highways in one county are out of repair, the whole parish shall contribute to the repair. (b) But there may be an agreement between the inhabitants, that the one shall repair one part, and the other the other; and such agreement is good between themselves, and for breach the one may have an action upon the case against the other: but in an indictment they shall take no advantage of these agreements, for as to the king they are equally liable. (c)

*Mod.* 112; *Vent.* 256; 3 *Keb.* 301. ¶ (b) And the whole parish shall be indicted for not repairing them, *R. v. Inhabitants of Clifton*, 5 T. R. 498, though the contrary was once holden in the case of *R. v. Inhabitants of Weston-under-Penyard*, 4 Burr. 2507, and cited in 5 Burr. 2702. (c) No agreement can take off this charge, which the law imposes on the parish. 1 *Vent.* 90. Therefore an indictment against an individual, or a corporation, for not repairing a highway, which by virtue of a certain agreement they are bound to repair, is bad. *R. v. The Mayor of Liverpool*, 3 East, 86.¶

Therefore, if the indictment is general against all the parish, all the parish shall be charged. But, if it be intended to charge one part or precinct of the parish to repair all the ways within the parish, it must be alleged in pleading, that by special prescription, or *ratione tenuræ*, such a part of the parish *de temps dont*, &c., hath been charged with the reparation of the ways.

*Vent.* 256; *Mod.* 112; 3 *Keb.* 301, *R. v. Great Broughton*, 5 Burr. 2700; *R. v. Sheffield*, 2 T. R. 111; *R. v. Penderryn*, *Ibid.* 513; *R. v. Bridekirk*, 11 East, 304 *R. v. Marton*, *Andr.* 276.

[If part of a parish be exempted by the provisions of an act of parlia



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ment from the charge of repair, the charge must necessarily fall upon the rest of the parish.

Rex v. Inhabitants of Sheffield, 2 T. R. 106.]

|| And if particular persons are charged with the repair of highways by a late statute, and become insolvent, the justices of the peace may put that charge on the rest of the parish.

Anon. 1 Ld. Raym. 725.]

But, though the parish be obliged of common right to repair the highways in it, yet it is certain that particular persons may be bound to repair the highway, by reason of enclosure or prescription; as, where the owner of lands not enclosed, next adjoining to the highway, encloses his lands on both sides of it: in which case he is bound to make a perfect good way, and shall not be excused by making it as good as it was before the enclosure, if it were then any way defective; because by the enclosure he takes from the people the liberty of going over the lands adjoining to the common track.

Roll. Abr. 390; Cro. Car. 366; Sid. 464.

Also it is said, that if one enclose land on one side, which hath anciently been enclosed on the other side, he ought to repair all the way; but that if there be not such an ancient enclosure on the other side, he ought to repair but half the way.

Sid. 464.

Therefore, if there be an old hedge, time out of mind, belonging to A on the one side of the way, and B having land lying on the other side, make a new hedge, there B shall be charged with the whole repair.

Sid. 464; 2 Keb. 665; 2 Saund. 157.

But, if A make a hedge on the one side of the way, and B on the other, they shall be chargeable by moieties.

Sid. 464; 2 Keb. 665.

But it seems clear, that wherever a person makes himself liable to repair a highway by reason of enclosure, he by throwing it open again frees himself of the burden of any further reparation.

2 Saund. 160; 1 Burr. 465.

|| If trustees under a road act turn a road through an enclosure, and make the fences at their own expense, and repair them for several years, they cannot be compelled to continue such repairs, unless there be a special provision in the act to that effect; the obligation to repair them lying on the owners of the land, where it is not otherwise provided for.

R. v. Commissioners of Llandillo District, 2 T. R. 232.]

[Where a new road has been made on a writ of *ad quod damnum*, in the same parish with the old road, the parishioners ought to keep it in repair; because being discharged from the repair of the old road, no new burden is laid upon them; their labour is only transferred from one place to another. But, if the new road lies in another parish, the person who sued out the writ, and his heirs, ought to keep it in repair; because the inhabitants of the other part gaining no benefit from the other road being taken away, it would be imposing a new charge upon them, for which they receive no compensation. *Per* Lord Hardwicke.

3 Atk. 772.]

Particular persons may be bound to repair a highway by prescription,

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and it is said that a corporation aggregate may be charged by a general prescription, that it ought and hath used to do it, without showing any consideration in respect whereof it had used to do it, (a) because such a corporation never dies. Neither is it any plea that the corporation hath done it out of charity. But it is said, that such a general prescription is not sufficient to charge a private person; because no man is bound to do a thing which his ancestors have done, unless it be for some special reason; as having lands descended to him holden by such service, &c. But it seems, that an indictment charging a tenant of lands in (b) fee with having used of right to repair such a way *ratione tenuræ terræ suæ*, without adding that his ancestors, or those whose estate he hath, have so done, is sufficient, for it is implied.

27 Ass. 8; 21 E. 4, 38; Bro. *Prescription*, 49, 78; Keilw. 52 a; Latch. 206; Hawk. P. C. 202, 203. (a) || So in the case of the inhabitants of a particular district or division in a parish or township. R. v. Inhabitants of Ecclesfield, 1 Barnw. & Ald. 348. || (b) Also, an occupier as such, though at will only, is indictable for suffering a house standing upon the highway to be ruinous, &c., and the words *ratione tenuræ*, &c., if added, are surplus. Salk. 357. ¶ Evidence of reputation as to the liability to repair, *ratione tenuræ*, held inadmissible as a matter of a private nature. Reg. v. Wavertree, 2 Mood. & Ry. 353. g

And it seems certain in all those cases, whether a private person be bound to repair a highway by enclosure or prescription, that the parish cannot take advantage of it on the general issue, but must plead it specially; (c) and that therefore, if to an indictment against the parish for not repairing a highway, they plead not guilty; this shall be intended only (d) that the ways are in repair, but does not go to the right of reparation.

R. v. Inhabitants of Holborn; Mod. 112; 3 Keb. 301, S. C.; Vent. 256, S. C.; 1 Freem. 521, S. C. (c) || See as to this point, R. v. Stoughton, 2 Saund. 159 b, n. 10; R. v. Inhabitants of St. Pancras, Peake's R. 219; R. v. Townshend, Dougl. 421; R. v. Inhabitants of Eardisland, 2 Campb. N. P. 494; R. v. Inhabitants of Ecclesfield, 1 Starkie, 393; ¶ Reg. v. Heage, 1 Gale & D. 548. g But it would not seem to be necessary to plead specially, when the burden of repairing is transferred from the parish by a public act of parliament, to which all are supposed to be privy, and of which all are supposed to have cognisance. R. v. Inhabitants of St. George, Hanover Square, 3 Campb. N. P. 222. (d) But the parish may upon this issue show not only that the way is in repair, but that it is not a highway, or that it does not lie within the parish; for all these are facts, which the prosecutor must allege in his indictment, and prove on the plea of not guilty; and it is a well-known rule of law, that whatever a plaintiff or prosecutor is bound to prove on the general issue pleaded to a declaration or indictment, the defendant may controvert the truth of by opposite evidence. R. v. Inhabitants of Norwich, 1 Str. 181. Upon this issue then the right to repair may come in question; for the inquiry, whether it be a public highway, necessarily brings into question the liability of the parish to repair; and if the right to repair may come in question, the defendants are entitled under the act of 5 W. & M. c. 11, § 6, to remove the indictment by *certiorari*. R. v. Inhabitants of Taunton St. Mary, 3 M. & S. 465. ||

¶ Where a canal company originally erected a bridge for the use of tenants of particular lands, but for ten years the public had crossed it without interruption, held, that it was properly left to the jury to say whether or not the company intended to dedicate it to the public, and, the jury having so found, the court, in the absence of any misdirection in law, refused to interfere with such finding.

Surrey Canal Company v. Hall, 1 Scott, N. S. 264; 1 Man. & Gr. 383. g

|| Though a local act empower trustees to take tolls, and direct the roads to be repaired thereout, still the tolls are only an auxiliary fund, and the inhabitants of the township, bound by prescription to repair the roads within it, are liable to be indicted for non-repair of this road.

Rex v. Netherthong, 2 Barn. & A. 179; and see 3 Camp. 222; 4 Barn. & C. 194.

## (F) Of the Provision for repairing, &amp;c.

Where it is shown that a township is prescriptively bound to repair all roads which would otherwise be repaired by the parish at large, this places the township in the situation of the parish, and they must show that some other persons in certainty are liable to repair in order to relieve themselves.

Rex v. Hatfield, 4 Barn. & A. 75.

Where a public road had been made such pursuant to an act of parliament, which was to continue in force for a limited period only, and the inhabitants of a parish through which it passed were thereby bound to do statute duty, it was held, that the performance of such statute duty was not an adoption of the road by the parishioners, and that, at the expiration of the act, they were not bound by common law to repair such road.

Rex v. Mellor, 1 Barn. & Adol. 32.¶

## (F) Of the Provision for repairing the Highways and Turnpike Roads by Act of Parliament.

[THE general statutes for this purpose, which were formerly very numerous, have lately been repealed, and reduced into two acts, viz. 13 Geo. 3, c. 78, and c. 84, the former of which relates to highways, and the latter to turnpike roads. These acts branch out into such a variety of clauses, that to detail their provisions would far exceed the limits of a work of this kind: We shall therefore content ourselves merely with stating such decisions as appear to bear upon them; among which will be found a few upon the abrogated statutes, the language of those statutes being followed, with very little variation, in the modern ones.]

Clergymen are within the purview of the statutes in respect of their spiritual possessions, as much as any other persons in respect of other possessions; for the words are general, and there is no kind of intimation that any particular persons shall be exempted more than others.

3 Keb. 255, 476; 1 Vent. 273; 2 Inst. 704; 1 Hawk. P. C. c. 76, § 15. [By stat. 30 Geo. 2, c. 25, § 23, persons serving for themselves as privates in the militia, are exempted from statute-work during the time of such service.]

It is no excuse for parishioners being indicted at common law for not repairing the highways, that they have done their full work required by statute; for the statutes being made in the affirmative, do not abrogate any provision of this kind by the common law.

Dalt. c. 26; 1 Hawk. P. C. c. 76, § 18.

The justices in appointing the six days' work upon the roads, must fix the particular days, and not generally appoint six days between such and such a day.

1 Salk. 347; 2 Ld. Raym. 858.

[Though the 13 Geo. 3, c. 78, § 24, declares, that no indictment shall be removed by *certiorari* before traverse and judgment, yet this clause does not take away the writ at the instance of the prosecutor, for the crown does not traverse, and it was calculated merely to prevent delay on the part of defendants.

R. v. Inhabitants of Bodenham, Cowp. 78.

The power given by § 16 of 13 Geo. 3, c. 78, to two justices to order any highway to be widened, extends to roads repairable *ratione tenuræ*; and upon disobedience to such order, the party may either be proceeded against summarily under the statute, or by indictment as an offence at common law.

R. v. Balme, Cowp. 648.]

(F) Of the Provision for repairing, &c.

|| By § 64 of this act it is enacted, "that it shall be lawful for the court before whom any indictment or presentment shall be tried for not repairing highways, to award costs to the prosecutor, to be paid by the person or persons so indicted or presented, if it shall appear to the said court, that the defence made to such indictment was frivolous; or to award costs to the person indicted or presented, to be paid by the prosecutor, if it shall appear to the said court that such prosecution was vexatious."||

[If the defendants be acquitted on an indictment removed by *certiorari* for want of prosecution, the Court of King's Bench have no power to award them costs under the above clause, upon the ground of its being a vexatious prosecution, but the application must be made to the judge at *nisi prius*. .

R. v. Inhabitants of Chadderton, 5 T. R. 272.]

||But a certificate from a judge, that the defence was frivolous, is in effect an awarding of the costs. The above clause does not require that they shall be awarded *in express terms*.

R. v. Inhabitants of Clifton, 6 T. R. 344.

Who is to be considered as the prosecutor within this clause, is matter of inquiry. It hath been holden, that a court of quarter sessions, before whom a parish is acquitted, may, by their order, award C & E to pay costs to the parish, although their names be not on the back of the indictment, and although the indictment originated in a presentment of A & B, constables, whose names are on the indictment. It hath been also holden to be enough if the order is entitled as in the prosecution of C & E, without showing that C & E are prosecutors; and that it need not appear on the face of the order, that the indictment was tried, if that appear by the record of the proceedings; and also that the order is good in form, if it be for the payment of the costs to the solicitor of the parish.

R. v. Commerell, 4 M. & S. 203.||

[Though a *certiorari* to remove a presentment be prosecuted by another than the justice who made the presentment, yet, if it be done with his consent, that circumstance will be no objection to it.

R. v. Inhabitants of Penderryn, 2 T. R. 260.

If a parish, consisting of two districts, which are bound to repair separately, be convicted for not repairing the road in one of the districts, the other district having no notice of the indictment, it will be considered as substantially the conviction of the one district, and if the fine be levied on an inhabitant of the other, a *mandamus* will be granted for a rate to be levied on the district bound to the repair. But the *mandamus* must be special, suggesting, that the part of the highway which was the subject of the indictment, lay wholly in the one township, and that the two townships were separately bound to repair their respective parts of the highway, in order to give such township an opportunity to traverse, by the return, either of those facts.

R. v. Townshend, Dougl. 421.]

||But applications of this kind must be made within a reasonable time after the levy.

R. v. Justices of Lancashire, 12 East, 366.

Where an enclosure act directed that all great tithes payable to the rector of the parish should be extinguished, and that the commissioners should ascertain the net value of such tithes, and affix a fair clear annual rent or sum of money per acre in lieu of such tithes, and as an adequate compensation

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for the same to the rector, it was held, that the rector was, in respect of such rates, rateable to the repair of the highways.

Rex v. Lacy, 5 Barn. & C. 702; and see 4 Ibid. 467.

The appointment of surveyors of highways under the 13 G. 3, c. 78, cannot be removed into the Court of King's Bench by *certiorari*.

Rex v. St. Alban's, 3 Barn. & C. 698.

The 13 G. 3, c. 78, § 27, 29, authorizing surveyors of highways to take and carry away materials for repair of highways, making satisfaction for damage done to the land by carrying away, the same to be ascertained in case of dispute by order of justices, and providing that no damages shall be recovered for any trespass if tender or payment into court of amends be made by defendant; it was held, that where surveyors had made a new way to carry materials, and, after action brought by the landowner, had paid money into court as amends, the sufficiency of such amends could not be questioned *at nisi prius*, but ought to have been settled by justices of the peace. But if such new way were made wantonly or unnecessarily, the plaintiff would not have been concluded by the amends paid into court.

Boyfield v. Porter, 13 East, 200.

A surveyor of highways is not authorized under the 13 G. 3, c. 78, § 6, and 64, to remove a fence in front of a house, for the purpose of widening the road, which in that part was not more than twenty-four feet wide, unless the fence be *on the highway*.

Lowen v. Kaye, 4 Barn. & C. 3.

The county is liable to repair the highways for three hundred feet in length next adjoining to the end of any bridge which the county is bound to repair.

West Riding of Yorkshire v. Rex, 5 Taunt. 284.

By a local act for better governing the parish of Paddington, it was enacted that no road which had not been repaired by the parish should be repaired out of the parochial funds, until such road should have been surveyed by two surveyors, and certified by them to have been properly formed, &c., one of the surveyors to be appointed by the vestry, and one by the freeholder or his lessee. A road had been set out by the proprietors for the purpose of letting the frontage of 5660 feet as building ground; eight houses had been built and were inhabited, and twenty-six carcasses erected. The road had been formed, constructed, &c., and used by the public for six months, and the freeholder and his lessee had appointed a surveyor, and required the vestry to appoint one, which they refused to do. The court in the exercise of its discretion refused to grant a *mandamus* to the vestry, to compel them to appoint a surveyor, inasmuch as such appointment would have the effect of throwing on the parish the burden of repairing a road, which would be not so much for the benefit of the public as for the peculiar benefit of the freeholder, during the time his buildings were erecting.

The King v. Paddington Vestry, 9 Barn. & C. 456.]]

(G) How the Parties obliged to repair are to be proceeded against, and what Defence they may make.

It seems clear, that no one ought to be punished for any offence against the highways, without being first called upon to answer for himself, except in the case of a presentment in a court-leet, and, as (*a*) some say, in the case of a presentment by a justice of peace on his view; and even in the case of

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a presentment in a court-leet, if it touch a man's freehold, as by charging him with being bound to repairs in respect of the tenure of his land, it may so far be traversed in the King's Bench, being removed thither by *certiorari*: and it may be traversed where the defendant in trespass justifies under it.

Keilw. 34; Crom. 110; Dalt. c. 26; 5 H. 7, 4 a; Dyer, 13 b, 14 pl. 64; Keb. 256, 829, 991; 2 Keb. 715, 728; Raym. 182. If a road be out of repair, and in consequence of such want of repair an injury happen, and the plaintiff and his agents have been guilty of no kind of neglect or want of prudence, the town is liable, notwithstanding the primary cause of the injury was a failure of a nut or bolt, which was insufficient or improperly fastened. *Hunt v. Pownall*, 9 Verm. 411. In such an action the burden of the proof is on the plaintiff to show that he was driving with ordinary skill and diligence at the time when the accident happened. *Adams v. Carlisle*, 21 Pick. 146. But at common law, no action lies against a town for damages sustained through a defect in the highways in such town. *Mower v. Leicester*, 9 Mass. 247. See *Farnum v. Concord*, 2 N. H. Rep. 392. § (a) So held by Holt; but the other justices *cont.*, because such a presentment cannot be a greater estoppel than the finding of a grand jury, who are upon oath. *Carth.* 212, 213; 1 Show. 270, 291, S. C.; 4 Mod. 38, S. C. || And this seemed to be the better opinion. *R. v. Justices of Writs*, 3 Burr. 1530; 1 Bl. Rep. 467, S. C. But the question is now put to rest by § 24, of the 13 G. 3, c. 78, which saves "to every person and persons that shall be affected by any such presentment his, her, or their lawful traverse to the said presentment, as well with respect to the fact of non-repair, as to the duty or obligation of repairing the said highways, as they might have had upon any indictment of the same presented and found by a grand jury." ||

Upon a certificate and affidavit that the highway is in good repair, exceptions to the form of the indictment may be taken, but not easily without such certificate and affidavit; and the exceptions of this kind are:

Hawk. P. C. 219.

1. That the indictment doth not certainly show a *locus a quo*, and a *locus ad quem*, but there is no need to show that a highway leads to a market-town.

2 Roll. Abr. 81, pl. 18; Palm. 389, 420; 2 Keb. 715, 728; Brownl. 6. [Neither of these particulars seems to be now requisite. 1 Str. 44; And. 137; 1 T. R. 570; 1 H. Bl. 355.]

2. That it is repugnant to itself, in showing where the nuisance was done; as, where it sets forth, that a man stopped a way at D, leading from D to E.

2 Roll. Abr. 81; 3 Keb. 644. [See *acc.* *R. v. Inhabitants of Gamlingay*, 3 T. R. 513, and that it will not be aided by a subsequent allegation that a certain part of the same highway situate in D, is out of repair. The words "from" and "to" are both exclusive. *Hammond v. Brewer*, 1 Burr. 376. See *R. v. Inhabitants of Harrow*, 4 Burr. 2091.]

3. That it doth not certainly show to what part of the highway the nuisance extended; as where it only says, that a certain part of the king's highway at K was stopped, without showing how much; or where it says, the place nuisanced contained so many feet in length, and so many feet in breadth, by estimation.

*Cro. Ja.* 324; 2 Roll. Abr. 80, 81. [But see *contr.* *R. v. Smith*, Say, 96; *R. v. Brookes*, *Ibid.* 167; *R. v. Inhabitants of East Lidford*, *Ibid.* 301.]

4. That it doth not show, with sufficient certainty, that the place nuisanced was a way common to all the king's people; as where it only calls it a horseway, or having called it a common footway to the church of D, adds, for all the inhabitants of D.

*Salk.* 359, pl. 8; 2 Ld. Raym. 1174; 6 Mod. 255; *Cro. El.* 63; *Vent.* 208; *Poph.* 206; 3 Keb. 728. [But, if it be alleged that the nuisance is to all the king's subjects, it is necessarily implied that the way wherein it is, is a common way to all the king's

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subjects. 1 Vent. 208; Say. 168.] || So, where in an indictment for not repairing a highway, it was described to be a certain common king's highway called A, leading from B to C, containing in length so much, and in breadth so much; and after verdict it was objected in arrest of judgment, that the description was too uncertain; for it should have shown whether it was a footway, or a way for carts, or for horses, &c., and so were the precedents; it was said *per cur.* the bounds of the way as to the length and breadth are properly described; and as this is laid to be a highway for all the king's subjects, we must take it to be a way for all sorts of passengers and carriages; and to say it is a highway for all the king's subjects, is a sufficient description of such a way. R. v. Inhabitants of Hatfield, Ca. temp. Hardw. 315; 8 East, 6, n. S. C. See also Allen v. Ormond, 8 East, 4.||

5. That an indictment for not repairing a highway, which the defendant ought to repair *ratione tenuræ*, doth (a) omit the word *sue*.

Noy, 83; 3 Keb. 855. (a) But this exception hath been of late overruled. Hawk. P. C. c. 76, § 90; R. v. Corrock, 1 Str. 178. β See Reg. v. Mizen, 2 Mood. & R. 382. An infant seised of lands in the actual possession of his guardian in socage, is not indictable for the repair of a bridge *ratione tenuræ*. Rex v. Sutton, 5 Nev. & M. 353; 1 Harr. & Woll. 423.β

6. That an indictment against J S, bishop of A, for not repairing a highway, &c., doth not show in what capacity he ought to do it.

3 Keb. 58.

7. That the nuisance is not expressed in proper terms; as where the indictment is, that the defendant diverted the highway, which cannot be, because a highway cannot be diverted, must always continue in the same place where it was, howsoever it be obstructed, and a new way made in another place.

And. 234.

8. That an indictment against several persons for not repairing, is laid jointly and severally. But it is no exception, that a presentment of such a highway's being out of repair by the default of the inhabitants, &c., doth not name any persons in certain; or that a presentment against a man for stopping a highway in his own land, which is well proved by the evidence of ploughing it, doth not lay the offence *vi et armis*.

2 Roll. Abr. 79, 81; Vent. 4.

9. [That a presentment against parishioners for not repairing a road, doth not allege it to lie in the parish, for they are otherwise not bound to repair it.

R. v. Inhabitants of Hertford, Cowp. 111.]

That the defendants cannot plead *quod non debent reparare*, without showing who ought.

Sid. 140; Carth. 213, S. P. agreed.

||10. That an indictment against a private person for not repairing a highway, does not allege that he is bound to do it *ratione tenuræ*, or any other way.

R. v. Walker, 2 Barnardist. 172.

11. That an indictment alleges that the road is very muddy, and so narrow that people could not pass without danger of their lives; for that it ought to say, that the way is out of repair. And Powell, J., observed, that saying that the way is so narrow that people could not pass, is repugnant to its being "the king's highway;" for that if it were so narrow, the people could never have passed there time out of mind.

Reg. v. Inhabitants of Stratford, 2 Ld. Raym. 1169.||

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And note; the defendant shall not be discharged by submitting to a fine, but a *distringas* shall go *ad infinitum*, till he repair the way.

Salk. 358; 6 Mod. 163. || Where there was a conviction upon an indictment for not repairing a way *ratione tenuræ*, the court would not inflict a small fine on a certificate of the way being repaired, until the prosecutor's costs were paid. *R. v. Wingfield*, 1 Bl. Rep. 602. But in order to warrant a judgment for abating a nuisance, the nuisance must be stated in the indictment to be *continuing*, else such a judgment would be absurd. *R. v. Stead*, 8 T. R. 142. And if the court be satisfied that the nuisance is effectually abated before judgment is prayed upon the indictment, they will not, in their discretion, give judgment to abate it. And they refused to give such judgment upon an indictment for an obstruction in a public highway, where the highway, after the conviction of the defendant, was regularly turned by an order of magistrates, and a certificate was obtained of the new way being fit for the passage of the public, and the affidavits stated that so much of the old way indicted as was still retained was freed from all encumbrances. *R. v. Incedon*, 13 East, 164. And after a verdict of acquittal, as well as a verdict of guilty, on an indictment for not repairing a road, the court has, under very special circumstances, suspended the entry of judgment, in order that the question might be re-considered on another indictment, without the prejudice of a former judgment. *R. v. Inhabitants of Wandsworth*, 1 Barn. & Ald. 63; *R. v. Inhabitants of Middlesex*, *Ibid.* 64, notes. ||

|| A justice of the peace who *indicts* a road for being out of repair, is entitled to his costs, under the 5 W. & M. c. 11, § 3, after a removal of the indictment by *certiorari*, if the defendant be convicted.

*R. v. Kettleworth*, 5 T. R. 33.

Any other prosecutor must show himself to be the party grieved to entitle himself to costs under this clause of the act.

*R. v. Incedon*, 1 M. & S. 268.

But this statute being now considered as (a) a remedial law, where the indictment has been removed by *certiorari*, several persons have been allowed costs under it as prosecutors: one, as constable of the manor within which the highway lay; the others, as parties grieved; they having used the way for many years in passing and repassing from their homes to the next market-town, and being obliged, by reason of the want of repair, to take a more circuitous route.

*R. v. Inhabitants of Taunton St. Mary*, 3 M. & S. 465. (a) In this case by Lord Ellenborough, and in *R. v. Kettleworth*, *supra*, by Lord Kenyon, and contrary to the opinion of Buller, J., in *R. v. Sharpness*, 2 T. R. 48, and *supra*, tit. *Certiorari*. vol. ii. p. 171. ||

[The Court of King's Bench will not grant an information to compel a parish to repair a highway, which is not much used, and when it appears that another highway, equally convenient to the public, is in good repair. They indeed never give leave to file an information for not repairing a highway, unless it appear that the grand jury have been guilty of gross misbehaviour in not finding the bill; (b) and they refuse it for this reason, that the fine set on conviction upon an information cannot be expended in the repair of the highway; whereas on an indictment it is always so expended.

*R. v. Inhabitants of Steyning*, Say. Rep. 92.] (b) || In one case where the court in tenderness to the defendants had forbore to make the rule *nisi* absolute, and had retained it in order to give them an opportunity of repairing the roads in the course of the summer; but which they did not do in a manner which showed they were in earnest; on that account, and for example's sake, the information was granted. *R. v. Inhabitants of Chedinfold*, Ca. temp. Harl. w. 159. ||

β The proper remedy for obstructing a street or highway is by indictment. *Commissioners v. Taylor*, 2 Bay, 282.

Where by the erection of a mill, water was thrown upon a highway, and a former proprietor of a mill built bridges over the water, which, during his



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ownership he repaired, and which were also repaired by the present proprietor, who did no other work on the roads; held, that the present proprietor was answerable in damages to an individual who sustained injury by reason of the defect in one of the bridges, and that the injury was properly left to the jury whether the mill or the road was the more ancient.

*Mulholland v. Brownrigg*, 2 Hawks, 349.*g*

¶ A plea by a parish indicted for non-repair, that another parish have repaired and been accustomed to repair, and of right ought to repair, is ill, for it ought to show a consideration, since it seeks to throw the burden of repair on another parish than that where the road lies.

*Rex v. St. Giles, Cambridge*, 5 Maule & S. 260; and see 2 Barn. & C. 166.

But a plea that a small district within the parish where the road lies has immemorially repaired all the roads in the district, of which the road indicted is one, is good.

*Rex v. Ecclesfield*, 1 Barn. & A. 348; and see 4 *Ibid.* 623.

An indictment against an extra-parochial hamlet, for not repairing a common highway within it, was held bad, for not alleging the inhabitants to be immemorially bound to repair, and that the hamlet was not part of a larger district bound to repair. *Quere*, whether an extra-parochial hamlet is bound to repair its roads? it seems that it is, and the highway acts speak of it as on the same footing with a parish: see § 45, 13 G. 3, c. 78.

*Rex v. Kingsmoor*, 2 Barn. & C. 190.

Where in trespass against the defendants, magistrates, it appeared that the defendants, on complaint of the surveyor of the whole parish, convicted the plaintiff of neglecting to do statute duty, and issued a warrant to levy a penalty under the statute, it was held, that the conviction being good upon the face of it, and unappealed against, the plaintiff could not in this action try the question whether the land which he occupied was exempt from repairing the roads in other parts of the parish, as he should have appealed against the conviction.

*Fawcett v. Foulis*, 7 Barn. & C. 394. As to statute duty see 34 G. 3, c. 74; 54 G. 3, c. 109 & 119; 44 G. 3, c. 52; *Wellbeloved on Highways*, p. 125.

In order to legalize an assessment for composition for statute duty, and a warrant of distress for the same, it must not only be made to appear to the magistrates that a composition is advisable, and the rate of composition fixed by the magistrates, but it must be also ascertained, by competent persons, what number of days' duty are required for repairing the road, the composition being demandable only in respect of that number of days' duty; and it seems that it should appear to the magistrates on oath, that the composition is advisable, and that where the composition is for several townships, it should appear on the face of the authority that it is advisable, in the judgment of the magistrates, in *each* township.

*Stanley v. Fielden*, 5 Barn. & A. 425.

Where an indictment charged that defendants removed a culvert in the parish of S opposite to a mill there, in a highway leading from S to H, it was held on motion in arrest of judgment that the case was distinguishable from *Rex v. Gamlingay*, 3 Term R. 513, and that it sufficiently appeared that the culvert was in the parish of S.

*Rex v. Knight*, 7 Barn. & C. 413.

The information on oath, on which a magistrate may present a road ac-

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cording to 13 G. 3, c. 71, § 24, must be given by the surveyor of the district where the road lies, and not the surveyor of another district.

Rex v. Fylingdales, 7 Barn. & C. 438.

A high constable not being authorized by any statute to present, must, when he presents persons for a nuisance to a highway, go before the grand jury and give evidence on oath.

Rex v. Bridgewater and Taunton Canal Company, 7 Barn. & C. 514. As to turnpike roads, see 3 G. 4, c. 126; 4 G. 4, c. 16, and 35, and 95; 5 G. 4, c. 69; 7 & 8 G. 4, c. 24; 9 G. 4, c. 77; Wellbeloved on Highways, ch. 4, § 2, ch. 6, § 3; and for forms of proceedings, Ibid. Append. part 2.¶

(H) Who hath a Right to a Way, and how he must claim it.\*

A MAN may have a way either by prescription, by grant, by reservation, by implication, or by owelty of partition, and shall not in a *cur. claudend.* be obliged to show which way he claims it; but it will be sufficient for him to allege *debet et solet*, &c., though in a bar in replication he must show his title precisely.

St. John v. Moody, 1 Ventr. 274; 2 Lev. 148, S. C.; 3 Keb. 528, 531, S. C. β A way in gross may be granted to one and his heirs, or it may accrue to him and his heirs by a reservation in his own deed conveying the land in which the way is reserved. White v. Crawford, 10 Mass. 183.γ

But he who prescribes for a way must show in certain whether it is a foot, horse, or cartway.

Yelv. 163.

If in bar of an action of trespass the defendant pleads that J S and all those whose estate he hath in certain lands, for themselves and their servants, time out of mind have had and used a way *in per et trans* the place where, &c., to the said lands; this is no good plea, because it is not (a) shown (b) *a quo loco* the said way is claimed; and the rather, because it is claimed by prescription, which ought not to be laid *in certo loco*.(c)

Alban v. Brownsall, Yelv. 163, adjudged; 1 Brownl. 215, S. C. (a) In an indictment for an incroachment upon, or not repairing the highway, this must be shown. 2 Roll. Abr. 81, pl. 18. But it need not be shown, where in pleading, a highway is named only as an abuttal, and is not the foundation of the plea. Palm. 421. [And in an indictment for a nuisance the *termini* need not be stated. R. v. Hammond, 1 Str. 44; R. v. Rawlins, 2 Keb. 715; R. v. Inhabitants of Glaston, Ibid. 728.] (b) It must be shown *a quo loco ad quem*, because you must not go over any ground but to the right place. Hob. 198; yet vide 2 Roll. Rep. 134, and 1 H. Bl. 351. But such defect is helped where issue is joined and tried upon the right of the way. Hob. 188, 190; Hutton, 10; Vent. 13; 2 Keb. 480, 488, adjudged; and vide Brownl. 6. (c)¶ The statement in the text is not warranted by the report of the case to which it refers; and in parts it is indeed not very intelligible. The language of the court in the case of Alban v. Brownsall as to this point was, that the prescription was not good, because it was not shown *a quo loco ad quem locum* the way was; and although a way may be in gross, yet it ought to be bounded and circumscribed to some certain place, *præsertim* when it appears to lie in usage from time whereof, &c., for it ought to be *in loco certo*; and not in one place *hodie*, and in another place *cras*, but constant and perpetual in one place. *Quod nota.*¶

If A be seised in fee of a backside in a town, and the high-street be next adjoining thereto on the east, and there be a gate in the backside which encloses it from the street, the gate being in the east next to the street; and

\* As the author under this division treats merely of *private* ways, it seemed to be improperly placed in the midst of the learning relating to public ways, and I have therefore taken the liberty of removing it to the end of this title. It formerly stood under letter (C).

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A be also seised in fee of a messuage and piece of land next adjoining to the backside on the north of the backside, and by deed enfeof B of the messuage and piece of land which are on the north of the backside, and by the same deed further grant to him and his heirs *liberos ingressum, egressum, et regressum in, ad et extra eadem concessa præmissa in, per et trans prædictas Januam* and backside; by force of this grant B may go from the street through the gate, and over the backside, to the messuage or piece of land of which he is enfeofed; but he cannot go through the said gate and backside to other places, or from other places to the street, without coming to the said messuage or piece of land; for the liberty is granted to him of ingress and egress *in, ad et extra eadem concessa præmissa*; so that this is made appurtenant to the premises before granted.

Roll. Abr. 391, Hodder and Holman.

In trespass for breaking the plaintiff's close, if the defendant justifies going over this close, because he had used time out of mind to have a way over it from D to Blackacre, and the plaintiff replies, that at the time of the trespass the defendant went with his carriages from D to Blackacre, *et dehinc* to a mill; this will not maintain his action, for when the defendant was at Blackacre, he might go whither he would.

Roll. Abr. 391, Sanders and Mose, [but vide 1 Mod. 190; 1 Ld. Raym. 75; 1 Lutw. 111, that the grantee of a road between certain limits, can only use it so as to go from one of those limits to the other. So, it hath been determined, that under a grant of a way from A to B *in, through, and along* a particular way, the grantee cannot make a transverse road across it. *Senhouse v. Christian*, 1 T. R. 560.]

But it seems, that if a man hath a way for carriages from D to Blackacre over my close, and after he purchases lands adjoining to Blackacre, he cannot use the said way with carriages to the land adjoining, for then it may be very prejudicial to my close. But it seems, if I will help myself, I must show the special matter, and that he used it for the land adjoining.

Roll. Abr. 391, *Howell v. King*; 1 Mod. 190, S. P.; *Laughton v. Ward*, 1 Lutw. 111, S. P.; 1 Ld. Raym. 75, S. C.; *Watson v. Bioren*, 1 S. & R. 227; *Kirkham v. Sharp*, 1 Whart. 323; *Lewis v. Carstairs*, 6 Whart. 193; *Ewing v. Desilver*, 8 S. & R. 92.

*In* trespass, plea justifying under a deed a right of way in and over the plaintiff's yard, to and from the space or opening under the loft then used as a wood-house; and 2d, a right to use the yard in common with the plaintiff and his tenants: held, that as to the latter the right was to be confined to the use of it, as it was at the time of the grant, and that it would not be extended to give a right to the defendant and his tenants of a cottage built afterwards on such space: as to the former claim, held, that though the words "now used as a wood-house," were to be taken as merely ascertaining its plan and description, yet the defendant was to be confined to the use of the way to a place which should be in the same predicament, and used substantially for the same purposes as it was at the time of making the deed, and had not therefore the right to use the way to the newly erected cottage.

*Allan v. Gomme*, 3 Perr. & D. 581; 11 Ad. & Ell. 759.

|| If there be a grant of "a *free and convenient way* in, through, and over a slip of land, leading from — to —, with liberty to make and lay causeways, &c., and to use the same with carriages, and to carry *coals*, &c., the grantee has a right to make any such way as is necessary for the carrying of that commodity, *e. g.* a framed wagon way.

*Senhouse v. Christian*, 1 T. R. 560.

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§ Under a demise of premises reserving a right, for the tenants of the adjoining tenements of the lessor, of way "on foot, and for horses, cattle, and sheep;" held, that a right of loading and carrying manure in a wheelbarrow across the defendant's premises could not be supported.

Brunton v. Hall, 1 Gall. & D. 207. §

A granted to B, his heirs and assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide (which divided those houses from a house then belonging to A) the right of using the said piece of land as a foot or carriage-way, and gave him "all other powers, &c., incident or necessary to the enjoyment of the way;" it was holden that under these terms B was entitled to put down a flagstone upon the piece of land in front of a door opened into it by him out of his house. It was clearly competent to B in this case to do any thing which is incident to the grant of a right of way; and, as the right to repair is at common law incident to such a grant, B had a right to repair in this manner as being the most effectual.

Gerrard v. Cooke, 2 N. R. 109. ||

A way must not be claimed as (a) appendant or appurtenant to a house, because it is only an easement, and no interest.

Yelv. 159. (a) But it may be *quasi* appendant thereto, and as such pass by grant thereof. Cro. Ja. 190.

§ If a right of way be limited to particular purposes, but there is a covenant that the same shall be kept open and free from encumbrances, the grantee has no right to put a fence on the same, nor in any other manner obstruct such way.

Brownwell v. Dyer, 5 Mason, 227. §

[A right of way may be extinguished by unity of possession, unless it be a necessary one (b), and then it shall not. But a right of watercourse doth not seem to be extinguished by unity of possession in any case.

Latch. 153; Poph. 166; Bull. Ni. Pri. 74.] (b) || A way of necessity is not extinguished by unity of possession; for unity of possession is the foundation of the right. See the nature and origin of this species very clearly and accurately stated in Mr. Serjt. Williams's notes to the case of Pomfret v. Ricroft, 1 Saund. 322 b, (note 6). See also Buckby v. Coles, 5 Taunt. 311. || § A right of way is extinguished by unity of possession, and cannot be claimed afterwards without a new grant. Grant v. Chase, 17 Mass. 443. §

If A have Blackacre, and C have Whiteacre, and A have a way over Whiteacre belonging to Blackacre, and then purchase Whiteacre, the way will be extinct; and if A afterwards enfeoff C of Whiteacre, without excepting the road, it is gone.

11 H. 4, 5; 21 E. 3, 2; Bull. Ni. Pri. 74.

J had four closes of land together, and sold three of them, reserving the middle close, to which he had no way but through that which he sold: it was holden, that though he did not reserve the way, yet it should be reserved for him.

Cro. Ja. 170, 189.

|| So, if I have a close encompassed with my own land on every side, and I alien this close to another, he shall have a way to it over my land as incident to the grant; for otherwise he cannot have any benefit by the grant. So, if the close aliened be not totally enclosed with my land, but partly with the land of strangers; for he cannot go over the land of strangers. (c) But this Lord Rolle questions; but, as it would seem, without sufficient ground.

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The necessity is as strong as where the circumjacent land is wholly the grantor's: the claim of a way of necessity is founded on grant, and supposes the land over which it runs to be the land of the grantor.

Clark v. Rugge, 2 Roll. Abr. 60, pl. 17; Cro. Ja. 170, S. C., by the name of Clark v. Cogge. (c) 2 Roll. Abr. 60, pl. 18.

If a trustee convey land, as trustee, to which there is not any way, except over his own land, a right of way over that passes of necessity, as incidental to the grant.

Howton v. Frearson, 8 T. R. 50.

Where it shall be a way of necessity, and by whom it shall be set out, whether by the grantor or grantee, would seem not to be settled. In one case (a) it is said the feoffor shall assign it where he may best spare it. In another, (b) it is said the grantee shall have a convenient way, and is not obliged to use the same way as the grantor does. And in another (c) it is said, Glyn, C. J., that the grantee may take a convenient way without the gree of the grantor, and the law may afterwards adjudge, whether it be convenient and sufficient, or more or less. And in a late case (d), Mansfield, C. J., says, "I know not how a way of necessity has been expounded, but it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had."

(a) 2 Roll. Abr. 117, pl. 17. (b) Oldfield's case, Noy, 125. (c) Parker v. Wellstead, 2 Sid. 112. (d) Morris v. Edgington, 3 Taunt. 31.

If the owner of a close, over which there is a right of way, plough up the way, and assign a new way, any person may justify using the new way as long as it lies open. But, if the owner afterwards stop up the new way, the removal of the obstruction to the new way cannot be justified.

Horne v. Widlake, Yelv. 141; Selw. N. P. 1180; Noy, 128.

As, where A, the owner of a close within a close belonging to B had a prescriptive right of way through B's close to his own; and twenty-four years before action brought B had stopped up this way and opened a new way, which had been used till very lately, when B had stopped it up; in an action by B against A for going over the new way, it was holden, that A could not justify the using of this way as a way of necessity, but that he should either have gone the old way, and thrown down the enclosure; or have brought an action against B for stopping up the old way. (e) The new way was only a way by sufferance during the pleasure of both parties, and A by stopping it up had determined his pleasure.

Reignold v. Edwards, Willes, 282. (e) But after this lapse of time, B might have claimed the new way as under a grant. Vide *infra*.

A way of necessity is not to be claimed in general terms, but a title to it is to be set forth, as it is in all claims of a way by grant.

Dutton v. Taylor, 2 Lutw. 1487; Bullard v. Harrison, 4 M. & S. 387. β Where a way is granted over the lands of a third person, the lessee is entitled to pass across the grantor's land the shortest way to the highway, as a way of necessity; and where it is a private way the grantor is bound to make it. Osborn v. Wise, 7 Carr. & P. 761. See Pernam v. Wead, 2 Mass. 203; Taylor v. Townsend, 8 Mass. 411; McDonald v. Lindall, 3 Rawle, 492.γ

The grantee of a way of necessity (and it is the same of any other private way) cannot, as in the case of a public way, justify going *extra viam* because the way is impassable or foundrous.

Taylor v. Whitehead, Dougl. 745; Bullard v. Harrison, *ubi supra*.

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Wherever the law gives a thing, it gives with it all that is necessary to the enjoyment of it. Upon this principle a parson has a right to a road into the close of his parishioner to carry away his tithes. But he has not therefore a right to every road which the parishioner uses for the occupation of his farm; but is restricted to that road only which the farmer uses for carrying away the other nine parts.

Payne v. Brigham, 2 Lutw. 1313; 3 Lev. 228, S. C.; Cobb v. Selby, 2 N. R. 466.

Again, the grantee of wreck thrown on another person's land has, of necessity, a right to a way over the same land to take it.

Anon. 6 Mod. 149.¶

[In an action for obstructing a way, the plaintiff proved that Fowler was seised of the plaintiff's tenement and the defendant's close, and in 1753 conveyed the tenement to the plaintiff with all ways therewith used, and that this way had been used with the tenement as far back as memory could go. The defendant produced a subsisting lease from Fowler for three lives made in 1723, by which Fowler demised the field in question in as ample manner as Rock, a former tenant, held it; and in this lease there was no exception of a way over the close. Yates, J., held, that by the lease without any reservation, the way was gone, and therefore could not pass under the words *all ways*, &c. But, as there were thirty years intervening between the defendant's lease, and the plaintiff's conveyance, and the way had been used all that time, that was sufficient to afford a presumption of a grant or license from the defendant so as to make it a way lawfully used at the time of the plaintiff's conveyance, and then the words of reference would operate upon it, and the way would pass.

Keymer v. Summers, Hereford Summer Assizes, 1769; Bull. Ni. Pri. 74.]

¶And it hath been since holden, that an adverse enjoyment of a right of way for twenty years unexplained, is evidence sufficient for the jury to presume that it was a lawful enjoyment.

Campbell v. Wilson, 3 East, 294. 2 Hazard v. Robinson, 3 Mason's C. C. R. 272. Non-user for a great number of years will forfeit a right to a highway. Commissioners v. Taylor, 2 Bay, 282; Beardslee v. French, 7 Conn. 125; but see White v. Crawford, 10 Mass. 183.¶

A man being seised in fee of the adjoining closes A and B, over the former of which a way had immemorially been used to the latter, devises B "with its appurtenances:" it was holden, that the devisee could not, under the word "appurtenances," claim a right of way over A to B, as no new right of way was thereby created, and the old one was extinguished by the unity of seisin in the devisor.

Whalley v. Thompson, 1 Bos. & Pull. 371.¶

If in bar to an action of trespass, the defendant pleads, that J S, and all those whose estate he hath in certain lands time out of mind, for themselves and their servants, have had and used, *passagium in, per, et trans* the place where, &c., and so justifies as servant; this is no good plea, for (a) *passagium* is (b) properly a passage over water, and not over land; and he ought to have prescribed in the way, and not in the passage, and should have used such words as are proper and known in law.

Yelv. 163; 1 Brownl. 215, adjudged. (a) For this vide 8 Co. 46 b. (b) So, a presentment in a leet for diverting the king's highway is merely void, for the word *divert* may be applied to a course of water, and a way may be obstructed or stopped, but it is not diverted when it is stopped, and another made in another place. And. 234, adjudged. ¶ If in case for an occupation-way the *terminus ad quem* be laid to be a public highway,

## Hue and Cry.

it is well enough proved by evidence of a public footway, for that is a public highway for foot passengers; though such a description might be bad on a special demurrer, as not pointing out with sufficient certainty the sort of highway meant. *Allen v. Ormond*, 8 East, 4. But see *Inhabitants of Hatfield*, *Ibid.* 6; *Ca. temp. Hardw.* 315, S. C. In case for obstructing a way, the declaration did not state the particular sort of way which the plaintiff prescribed for; and held that after a verdict it shall be intended a general way for all purposes. *Warner v. Green*, *Com. Rep.* 114.¶

A man may prescribe for a way from his house, through a certain close, &c., to church,(a) though he himself hath lands next adjoining to his house, through which of necessity he must first pass; for the general prescription shall be applied only to the lands of others.

*Palm.* 387, 388; 2 *Roll. Rep.* 397. (a) So, if a man hath a way over a common field, part whereof doth belong to himself, for the infiniteness of the case he may prescribe generally. *Palm.* 388; 2 *Roll. Rep.* 398. β A way by prescription strictly so termed, can exist only by an adverse claim and exercise of the right for sixty years. But a presumption of a grant of a way arises from an adverse possession for twenty years. *Gaetty v. Bethune*, 14 *Mass.* 49. A way which has been used by a neighbour for forty years, when the commencement of the usage is known, will not suffice to establish it as a way. *Bordeaux v. Williamson*, 2 *Hay.* 301.γ

¶ In trespass *quare clausum fregit* the defendant prescribed for an occupation-way from his own close “unto, through, and over” the *locus in quo*, “to and unto a certain highway,” &c., it was holden, that this plea might be sustained, though one of several intervening closes was in the possession of the defendant himself.

*Jackson v. Shillito*, 1 *East*, 381.

One may, under the grant of an occupation-way, declare in case against the owner of the land over which the way leads, for obstructing it, although it be proved that the public in general have used the way without denial for the last twelve years. But one cannot claim a way at the same time as a general way and a private way by prescription.

*Allen v. Ormond*, 8 *East*, 4; *Chichester v. Lethbridge*, *Willes*, 71.¶

A man cannot allege that he cannot use his way as well as he could before, but must plead that he could not use the way at all.\*

*Godb.* 52, 53. \* If a way is in part obstructed, and may be passed through, but such passage is attended with danger or difficulty, he may allege, that he cannot use his way in so large and ample a manner as he was used, and of right still ought to use the same.

β A person over whose land another has a right of way, is liable to an action for stopping the way, but not for suffering to be out of repair, unless he is bound by contract or prescription to repair it.

*Doane v. Badger*, 12 *Mass.* 65.γ

## HUE AND CRY.

HUE and cry is the pursuit of an offender from town to town till he be taken, which all who are present when a felony is committed, or a dangerous wound given, are by the (b) common law, as well as by statute, bound to (c) raise against the offenders who escape, on pain of fine and imprisonment.

3 *Inst.* 116, 117; 2 *Inst.* 172; *Dalt. Justice*, c. 28, 109; *Fitz. Coron.* 395; *Cro*

## (A) At Common Law, or Suit of the King.

Eliz. 654; Crompt. 178. [Lord Coke saith, that hue and cry, (called in ancient records *hutesium et clamor*) mean the same thing; for that *huer* in French is to hoot or shout, in English to cry. 2 Inst. 173; 3 Inst. 116. But since it appeareth by the old books (of which also Lord Coke maketh observation, 2 Inst. 173) that hue and cry was anciently both by horn and by voice, it may seem that these two words are not synonymous, but that this *hutesium* or *hooting* is by the *horn*, and *crying* by the *voice*; with which also accordeth the French word *huchet*, which signifies a huntsman's horn: so that hue and cry in this sense will properly signify a pursuit by horn and by voice. Which kind of pursuit of robbers by blowing a horn, and by making an outcry, is said to be practised also in Scotland. And this blowing of a horn, by way of notice or intelligence, in other cases as well as in the pursuit of felons, seemeth to have been in use of very ancient time; for amongst the laws of Wihtrid king of Kent, in the year 696, is this one; "if a stranger go out of the road, and neither shout, nor blow a horn, he shall be taken for a thief." Burn's Just. tit. "*Hue and Cry*."] (b) That it is the old common law process after felons and such as have dangerously wounded any person. 2 Hal. Hist. P. C. 98.—And therefore Bracton says, *quod omnes tam milites quam alii, qui sunt quindecim annorum et amplius, jurare debent quod ullagatos, murtheratores, robbatores et burglatores non receptabunt, nec iis consentient, nec eorum receptatoribus, et si quos tales noverint eos attachiari facient, et hoc vicecomiti et ballivis suis monstrabunt, et si hutesium vel clamorem de talibus audiverint, statim audito clamore sequentur cum familiâ et hominibus de terrâ suâ.* Bract. lib. 3, tr. 2, c. 1. (c) May be by a horn or by the voice. 2 Inst. 172.

As the raising of hue and cry is enjoined by the common law, which may be called a raising of it at the suit of the king, as well as by several acts of parliament, which may be called a raising of it at the suit of a private person, inasmuch as those statutes make the hundred answerable to the party robbed, if they neglect to pursue the hue and cry, and apprehend the robbers; therefore we shall consider,

## (A) Hue and Cry at the Common Law or Suit of the King: And herein,

1. *By whom Hue and Cry is to be levied.*
2. *In what Manner it is to be levied.*
3. *In what Manner to be pursued.*
4. *What the Persons may justify doing who pursue it.*
5. *How the Omission or Neglect of doing it is punished.*

## (B) Of raising Hue and Cry pursuant to the several Statutes, which declare in what Manner the Hundred shall be chargeable: And herein,

1. *What Kind of Robbery it must be so as to make the Hundred liable, and how far it is necessary that it be done on the Highway.*
2. *On what Day, or Time of the Day, it must be committed.*
3. *What Hundred shall be said to be liable.*
4. *What Person is to bring the Action, and make Oath of the Robbery.*
5. *Of the Notice to be given of the Robbery.*
6. *Where the Party must give Bond for Payment of Costs, in case he does not prevail.*
7. *Of the Oath to be taken of the Robbery, and before whom the same must be.*
8. *At what Time the Action is to be brought.*
9. *What Evidence will maintain it; and therein of the Witnesses for and against it.*
10. *What shall excuse the Hundred; and therein of apprehending the Robbers.*
11. *How the Money is to be levied, and each Hundredor to contribute to the Charges.*

## || (C) Of other Statutes giving similar Actions against the Hundred.||

## (A) Hue and Cry at Common Law, or Suit of the King: And herein,

1. *By whom Hue and Cry is to be levied.*

It seems to be clearly agreed, that a private person who hath been robbed, or who knows that a felony hath been committed, is not only authorized



(A) At Common Law, or Suit of the King.

to levy hue and cry, but is also bound to do it under pain of fine and imprisonment.

2 Inst. 172; 3 Inst. 116; Hal. Hist. P. C. 464.

From hence it follows, that although it is a good course, as my Lord Hale says, to have a precept or warrant from a justice of peace for raising hue and cry, yet it is neither of absolute necessity, nor sometimes convenient, for the felons may escape before the justice can be found. Also, hue and cry was part of the law before the statute of 1 E. 3, c. 16, which first instituted justices of the peace.

2 Hal. Hist. P. C. 99.

And although also, says he, it is especially incumbent upon constables to pursue hue and cry, when called upon, and they are severely punishable if they neglect it; and it prevents many inconveniences if they be there, for it gives a greater authority to the pursuit, and enables the pursuants, in their assistance, to plead the general issue upon the statutes of 7 Ja. 1, c. 5, & 21 Ja. 1, c. 12, without being driven to special pleading; and therefore to prevent inconveniences that may happen by unruliness, it is most advisable that the constable be called to this action; yet upon a robbery or other felony committed, hue and cry may be raised by the (a) country, in the absence of the constable; and in this there is no inconveniency; (b) for if hue and cry be raised without cause, they that raise it are punishable by fine and imprisonment.

2 Hal. Hist. P. C. 69, 100. (a) And is therefore called *cry de pais*, 2 Hal. Hist. P. C. 100.—Of the manner of raising it according to the law of the forest, vide 4 Inst. 294. (b) 29 E. 3, 39; Fitz. *Trespas*, 252; Crompt. 179; 21 H. 7, 28 a.—As disturbers of the king's peace. 2 Inst. 172.

## 2. In what Manner it is to be levied.

The regular method of levying hue and cry, is for the party to go to the constable of the next town and declare the fact, and (c) describe the offender, and the way he is gone; whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make search for the offender; and upon not finding him, to send the like notice, with the utmost expedition, to the constables of all the neighbouring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and they to the next, till the offender be found.

3 Inst. 116; Dalt. Justice, c. 28; Crompt. 178; 2 Hawk. P. C. c. 12, § 6. (c) Ought, if he knows it, to tell his name, describe his person, habit, horse, and such other circumstances, as he knows, which may conduce to his discovery. 2 Hal. Hist. P. C. 100.

## 3. In what Manner to be pursued.

The constable is not only to make search in his own vill, but is also to raise all the neighbouring vills, who are all to pursue the hue and cry with horsemen as well as footmen until the offender be taken.

2 Hal. Hist. P. C. 101.

## 4. What the Persons may justify doing who pursue it.

For the understanding hereof we shall here insert what my Lord Chief Justice Hale apprehends to be the law in this matter.

1. That in case of hue and cry once raised and levied upon supposal of a felony committed, though in truth there was no felony committed; yet those,

(A) At Common Law, or Suit of the King.

who pursue hue and cry, may arrest and proceed as if a felony had been really committed.

2 Hal. Hist. P. C. 101.

And therefore the justification of an imprisonment by a person upon suspicion, and by a person, especially a constable, upon hue and cry levied, do extremely differ; for in the former there must be a felony averred to be done, and it is issuable; but in the latter, viz., upon hue and cry, it need not be averred, but the hue and cry levied upon information of a felony is sufficient, though perchance the information was false; and therefore an averment of a felony committed, in case of a justification of an imprisonment upon hue and cry, is not necessary; the reasons whereof are, 1. Because the constable cannot examine the truth or falsehood of the suggestion of him who first levied it, for he cannot administer him an oath; and if he should forbear his pursuit of the hue and cry till it be examined by a justice of peace, the felon might escape, and the pursuit would be lost and fruitless. 2. By several acts of parliament he is compellable to pursue hue and cry, and is punishable, as those of the vill, if they do it not. 3. Because he that raiseth a hue and cry where no felony is committed, viz., the person that giveth the false information, is severely punishable by fine and imprisonment, if the information be false; and therefore if he raise a hue and cry upon a person that is innocent, yet they that pursue the hue and cry may justify the imprisonment of that innocent person, and the raiser is punishable; and by the same reason, if he give notice of a felony committed when there was in truth none.

5 H. 7, 5 a; 21 H. 7, 28 a, *per* Rede; 2 E. 4, 8 and 9; 29 E. 3, 39; 2 Inst. 173; 2 Hal. Hist. P. C. 102.

2. If hue and cry be raised against a person certain for felony, though possibly he is innocent, yet the constables, and those that follow the hue and cry, may arrest and imprison him in the common jail, or carry him to a justice of the peace.

2 Hal. Hist. P. C. 102.

3. If the person pursued by hue and cry be in a house, and the doors be shut, and refused to be opened upon demand of the constable, and notice given of his business, he may break open the doors; and this he may do in any case where he may arrest, though it be only a suspicion of felony, for it is for the king and commonwealth, and (a) therefore a virtual *non omittas* is in the case; and the same law is upon a dangerous wound given, and a hue and cry levied upon the offender.

7 E. 3, 16 b; 2 Hal. Hist. P. C. 102. (a) 5 Co. 92, Semain's case.

And it seems in this case, that if he cannot be otherwise taken, he may be killed, and the necessity excuseth the constable.

Hal. Hist. P. C. 102.

4. Upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search in suspected places within his vill, for the apprehending of the felons.

Dalt. c. 28; 2 E. 4, 8 b; Crompt. de Pace, 178; 2 Hal. Hist. P. C. 103.

But though he may search suspected places or houses, yet his entry must be *per ostia aperta*, for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied be there, and then it is true he may; therefore in case of such a search, the breaking open the door

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is at his peril, viz., justifiable if the person be there. But it must be always remembered, that in case of breaking open a door, there must first be a notice given to them within of his business, and a demand of entrance, and a refusal, before the doors can be broken.

2 Hal. Hist. P. C. 103.

5. If the hue and cry be not against a person certain, but by description of his stature, person, clothes, horse, &c., the hue and cry doth justify the constable, or other person, following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant; it is a kind of process that the law allows, (not usual in other cases,) viz., to arrest a person by description.

2 Hal. Hist. P. C. 103.

6. But, if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor describable by person, clothes, or the like, yet such a hue and cry is good, as hath been said, and must be pursued, though no person certain be named or described.

2 Hal. Hist. P. C. 103.

And therefore in this case, all that can be done is, for those who pursue the hue and cry, to take such persons as they have probable cause to suspect; as for instance, such persons as are vagrants, that cannot give an account where they live, whence they are; or such suspicious persons as come late into their inn or lodging, and give no reasonable account where they have been, and the like.

2 E. 4, 8 b; 2 Hal. Hist. P. C. 103.

And here the justification of the imprisonment is mixed, partly upon the hue and cry, and partly upon their own suspicion; and therefore, 1. In respect that it is upon hue and cry, there needs no averment that the felony was done; yet it must be averred that an information was given that the felony was done, if the arrest be by that constable that first received the information, and so raised the hue and cry; or if the arrest were made by that constable, or those vills to whom the hue and cry came at the second hand, it must be averred that such a hue and cry came to them, purporting such a felony to be done. But, 2. Also inasmuch as the hue and cry neither names nor describes the person of the felon, but only the felony committed; and therefore the arrest of this or that particular person, and so applied, is left to the suspicion and discretion of the constable, or the people of the second or third vill; he that arrests any person upon such general hue and cry, must aver that he suspected, and show a reasonable cause of suspicion.

2 Hal. Hist. P. C. 104.

But now by the statute of 7 Ja. 1, c. 5, the constable, or any that come in to his assistance, even in this case of hue and cry, may plead the general issue, and give the whole matter of the justification in evidence; for the pursuit of hue and cry, though performed by others as well as the constable, is principally the act of the constable of the vill, and the others are but his deputies or assistants within the precincts of his constablewick.

2 Hal. Hist. P. C. 104.

#### 5. *How the Omission or Neglect of not doing it is punished.*

There can be no doubt but that both by the common law, as also by the several statutes which enjoin the levying of hue and cry, they who neglect

(B) Of raising Hue and Cry, &amp;c.

to levy one, (whether officers of justice, or others,) or who neglect to pursue it when rightly levied, are punishable by (a) indictment, and may be fined and imprisoned for such neglect.

2 Hal. Hist. P. C. 4. (a) It is one of the offences which may be inquired of and punished in the sheriff's torn or leet. Dalt. Sheriff, 394; 2 Hawk. P. C. c. 10.

And now by the 8 Geo. 2, c. 16, § 16, reciting that "by the above-mentioned statutes, [viz., 13 E. 1, st. 2, c. 1 and 2, and 27 Eliz. c. 13,] it is enacted, that fresh suit and hue and cry shall be made and pursued, yet no particular person or persons is thereby expressly required to make and cause such hue and cry and pursuit to be made, whence it hath often happened, that the same hath been so much neglected and delayed, that felons have had time to make their escape, and the intention of the said statutes hath been thereby in great measure frustrated; it is enacted, that every constable, borsholder, headborough, or tithingman, to whom notice shall be given, or at whose dwelling-house notice of any robbery shall be left, and that every constable of the hundred, and every constable, borsholder, headborough, or tithingman, of any town, parish, village, hamlet, or tithing, within the hundred, or the franchises within the precinct thereof, wherein the robbery shall happen, as soon as the same shall come to his knowledge, either by notice from the party or parties robbed, or from any other person or persons, to whom notice shall be given thereof, pursuant to this present or any other statute, shall, with the utmost expedition, make and cause to be made, fresh suit and hue and cry after the felon or felons by whom such robbery shall be committed; and if any constable, borsholder, headborough, or tithingman, shall offend in the premises, by refusing or neglecting to make, or cause to be made, such fresh suit and hue and cry, every such offender shall, for every such refusal or neglect, forfeit 5*l*."

(B) Of raising Hue and Cry pursuant to the several Statutes which declare in what Manner the Hundred shall be chargeable for Robberies.

THE levying of hue and cry is, as has been already observed, enjoined by several acts of parliament, and to this purpose it is enacted by (b) Westm. 1, c. 9, that all be ready and apparelled at the summons of the sheriff *et cry de pais*, to pursue and arrest felons, as well within franchises as without; and if they do it not, and be thereof attaint, *le roy prendra a eux grevement*, they are to be indicted and fined for the neglect.

(b) That though some imagine that hue and cry was grounded on this statute, yet my Lord Coke says, that it was used long before, as appears even by this statute, which, instead of introducing a new law, enforces obedience to that which was founded in the ancient laws of the realm. 2 Inst. 171.

By the statute of 4 E. 1, *de officio coronatoris*, hue and cry shall be levied for all murders, burglaries, men slain or in peril to be slain, as otherwise is used in England; and all shall follow the hue and steps as near as they can; and he that doth not, and is convicted thereof, shall be attached to be before the justices in eyre.

See this statute at length, tit. *Coroner*, (C).

By the statute of Winton, or 13 E. 1, c. 1, it is enacted, that from thenceforth every country shall be so well kept, that immediately upon robberies and felonies committed fresh suit shall be made from town to town, and from country to country. And, c. 2, of the said statute, "If the country will not answer for the bodies of such manner of offenders, the pain shall be such, that every country, that is to wit, the people dwelling in the country, shall be answerable for the robberies done, and also the damages; so that

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the whole hundred where the robbery shall be done, with the franchises being within the precinct of the same hundred, shall be answerable for the robberies done: And if the robbery be done within the division of two hundreds, both the hundreds and the franchises within them shall be answerable: And after that the felony or robbery is done, the country shall have no longer space than (a) forty days, within which forty days it shall be-hove them to agree for the robbery or offence, or else that they will answer for the bodies of the offenders."

(a) My Lord Coke says, that this statute expressly gives half a year, and not forty days, as mentioned in an edition of the statutes then lately published; but that the forty days are given by the statute 28 E. 3, c. 11; 2 Inst. 569.—But in 3 Lev. 320 it is said, that upon search of the parliament roll, it appears that the statute of Winton gives only forty days to the country, and that the statute 28 E. 3 is but a confirmation thereof; and accordingly it was adjudged, where the plaintiff brought an action on the statute of Winton, and declared that he was robbed, and none of the robbers taken within forty days, according to the said statute; and with this the modern precedents agree, as Rast. Ent. 406; Co. Ent. 351; Herne, 215; The. Brev. 141; 2 Saund. 376.

The (b) statute of Winton(c) gives the action against the hundred; but by subsequent statutes, such as 27 Eliz. c. 13; 8 Geo. 2, c. 16, several alterations and additions have been made therein, which we shall consider under the following heads.

[In 2 Wils. 92, it is said by Mr. J. Bathurst, that "it was his opinion, that this statute did not create damages, but only gave the party a different remedy from that which he had before: for the party robbed, before that statute, might have laid an action against the hundred for not keeping watch and ward." But in the case of Jackson v. Calesworth, 2 T. R. 72, the Court of King's Bench inclined to think that no such action ever had been brought, or would have lain against the hundred before the statute, they not being a corporation.] (b) That this is not a penal law, so that the statutes of jeofails extend to actions brought thereupon, but is a law made for the peace of the kingdom, and advancement of justice, 12 Mod. 242; || Andr. 112; Cowp. 487. It is of great public advantage that the inhabitants of a hundred should be diligent and active in the pursuit of robbers; and the true reason why a hundred is chargeable is, because the inhabitants have not taken the robbers within a certain time, and not because they did not prevent the robbery, Cooper v. Hundred of Basingstoke, 7 Mod. 157; 2 Ld. Raym. 828; 11 Mod. 12. || (c) And therefore the best way for the plaintiff to conclude his declaration is *contra formam statuti*, because the statute of Winton only gives the action, Cro. Ja. 187; Yelv. 116; Noy, 125; Show. 94; Andr. 115, 117; Comb. 160, 161; Ca. temp. Hardw. 409.

|| The action against the hundred must be by original, and the declaration must be against the inhabitants generally; for if it be against any by name, and all are not named, it is bad.

Steward v. Howey, 3 Keb. 126. ||

1. *What Kind of Robbery it must be so as to make the Hundred liable, and how far it is necessary that it be committed on the Highway.*

It seems to be admitted, that no kind of robbery will make the hundred liable, but that which is done openly, and with force and violence; and that therefore the (d) private stealing or taking of any thing from the party, does not come within the statutes which make the hundred liable; for the hundred is not liable because they did not prevent the robbery, but because they did not apprehend the robbers, which in private felonies, of which they had no notice, it would be difficult, if not impossible for them to do.

7 Co. 6, 7; 2 Salk. 614. (d) Where a carrier's son and servant conspired to rob him. Styl. 427.

Also, it hath been adjudged and is admitted in all the books which speak of this matter, that a robbery in a house, whether it be by day or by night,

## (B) Of raising Hue and Cry, &amp;c.

does not make the hundred liable. The reasons whereof are, that every man's house is in law esteemed his castle, which he himself is obliged to defend, and into which no man can enter, to see what is doing there, without his leave. Also, being done in a house, the inhabitants of the hundred cannot be presumed to have notice of it, so as to be able to apprehend the offenders.

7 Co. 6, 7, Sendill's case, 8 Moor. 620; 3 Leon. 262; Cro. Ja. 496; Cro. Eliz. 753; Bulstr. 146; 2 Inst. 569; 2 Salk. 614.

But, if a person be assaulted in the highway, and carried into a house, and there robbed, it seems the hundred shall be liable; for otherwise the provision made by the statute would be eluded.\*

Sid. 263, et vide Salk. 614; 7 Mod. 157. \*The case in Sid. does not warrant the text, neither does Salk., yet there is some mention of such a case in 7 Mod. 160, supposing it to be an empty waste house; but no opinion as to this point. [In 2 Ld. Raym. 828, it is said by Holt, C. J., that the hundred in such case shall not be liable.]

Also, it does not seem necessary that the robbery should be committed in the highway, nor alleged to have been so by the plaintiff in his declaration.

7 Mod. 159, may be in a private way,—may be in a coppice; and in both cases the hundred shall be chargeable. 2 Salk. 61.

Therefore, where upon the statute of hue and cry the plaintiff declared, *quod quædam personæ ignotæ, &c., apud quendam locum ex australi parte cujusdam Januæ vocat. Fair-mile Gate, infra parochiam, &c., vi et armis* assaulted him, and robbed him of so much money, and there was a verdict for the plaintiff; it was moved in arrest, that *apud quendam locum* might be meant of a robbery committed in a house, garden, or wood, for which the hundred is not liable, being only obliged to guard the highways: But it was holden, that the declaration was good, especially after verdict, because it must be intended that this was given in evidence, otherwise the plaintiff would have been nonsuited. Also, the court held, that without the help of a verdict, this declaration had been good, and that it was not necessary for the plaintiff to allege, that the robbery was committed on the highway, more than that it was committed by day, and not by night, and that all the ancient precedents were accordingly.

Carth. 71; 3 Mod. 258; Show. 60; Comb. 150, S. C. adjudged between Young and the Inhabitants of the Hundred of Tulsecomb.

## 2. On what Day or Time of the Day it must be committed.

It hath been resolved by three judges against one, that a robbery on the Sabbath-day should charge the hundred, and that the pursuing of robbers who violate the Sabbath was so far from being a profanation of that day, that it was a work of charity and justice: also, that several persons, such as physicians, chirurgeons, midwives, &c., were necessitated to travel on that day, and that it was but reasonable that they should be protected in their journey.

Cro. Ja. 496, Waite v. the Hundred of Stoke; Brown, 156, S. P. admitted.

But now by the 29 Car. 2, c. 7, § 5, it is enacted, "That if any person or persons whatsoever, which shall (a) travel upon the Lord's day, shall be 'then robbed, that no hundred, or the inhabitants thereof, shall be charged with, or answerable for, any robbery so committed; but the person or persons so robbed shall be barred from bringing any action for the said robbery; any law to the contrary notwithstanding. Nevertheless, the inhabitants of the counties and hundreds (after notice of any such robbery to them or some

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of them given, or after hue and cry for the same to be brought), shall make or cause to be made fresh suit and pursuit after the offenders with horsemen and footmen, according to the statute made in the twenty-seventh year of the reign of Queen Elizabeth; upon pain of forfeiting to the king's majesty, his heirs and successors, as much money as might have been recovered against the hundred by the party robbed, if this law had not been made."

(a) \* This statute does not extend to persons in the country going to church, nor to physicians, chirurgeons, &c., who are under a necessity of travelling on this day. *Tashmaker v. Hundred of Edmonton*, Stra. 406; Com. 345.

It is clearly agreed, that for a robbery committed in the night, the hundred is not chargeable, because they cannot be presumed to have notice thereof, so as to be able to apprehend the robbers.

7 Co. 6 b, Milborn's case; 2 Inst. 569.

But yet it is not necessary that the robbery should be committed after sunrise, and before sunset; and therefore if there be as much daylight at the time that a man's countenance might be discerned thereby, though it be before sunrise or after sunset, the hundred shall be liable.

7 Co. 6 a, Ashpole's case; Cro. Ja. 106; And. 158; Leon. 57; Savil, 83.

Also, it is not necessary for the plaintiff to allege in his declaration, that the robbery was committed in the daytime, and not in the night. But it seems, that if upon the evidence it turns out to have been committed in the night, he cannot have a verdict.

Carth. 71; Comb. 150; 3 Mod. 258, and see the authorities to third paragraph above. Show. 62, S. P. admitted. [Though a special verdict should not state the robbery to have been committed in the day, yet, if it do not find that it was in the night, the hundred will be liable. 2 Ld. Raym. 829.]

Also, it hath been holden, that if robbers drive or oblige the wagoner to drive his wagon from the highway by day, but do not rob or take any thing till night, that yet this is a robbery in the daytime so as to charge the hundred.

Sid. 263; 7 Mod. 159; 3 Mod. 258; Comb. 150; Carth. 71.

### 3. What Hundred shall be said to be liable.

By the statute of Winton it is enacted, "That if the robbery be done within the division of two hundreds, both the (a) hundreds and the franchises within them shall be answerable."

(a) An action may be brought against the inhabitants *in dimidio hundredi de W*, and this half hundred the court will intend a hundred of itself, especially after verdict; and that if it were otherwise, it should have been so pleaded or given in evidence; and that it is the same thing as an action brought against the Inhabitants of the Hundred of W, commonly called the Half Hundred of W. Hob. 246, Constable's case; Brownl. 156, S. C.

If robbers assault a person with an intent to rob him in one hundred, and he escapes and flies into another, whither he is pursued by the robbers, and there robbed, the last hundred shall be liable.

Hutton, 125; Dean's case, *per cur.*

So, where by special verdict it was found, that the plaintiff was travelling in the highway in the hundred of A, where he was set upon and carried into the hundred of B, and robbed in a copse in the highway of this hundred; it was adjudged that the hundred of B should be liable, for that there the robbery was committed, and not before.

Cowper v. the Hundred of Basingstoke, 2 Salk. 614; 2 Ld. Raym. 826, S. C.; 7 Mod. 157, S. C.

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If one be taken in the hundred of A, and carried into the hundred of B into a house there, viz., a mansion-house, and robbed; or taken in the day-time in A, and carried to B, and there robbed in the night, it is said that there is no remedy against either hundred; these cases not being provided for by the statute.

2 Salk. 615.

By the 27 Eliz. c. 13, § 2, reciting *inter alia*, that “large scope of negligence is given to the inhabitants and residents in other hundreds and counties, not to prosecute the hue and cry made, followed and brought unto them, by reason they are not chargeable for any portion of the goods robbed, nor with any damages in that behalf given; it is enacted, that the inhabitants and residents of every or any such hundred (with the franchises within the precinct thereof), wherein negligence, fault, or defect of pursuit and fresh suit, after hue and cry made, shall happen to be, shall answer and satisfy the one moiety or half of all and every such sum or sums of money and damages, as shall by force or virtue of either of the said statutes, (13 E. 1, st. 2, c. 1 & 2, 28 E. 3,) or either of them, be recovered or had against or of the said hundred, with the franchises therein, in which any robbery or felony shall at any time hereafter be committed or done; and that the same moiety shall and may be recovered by action of debt, bill, plaint, or information in any of the queen’s majesty’s courts of record at Westminster, by and in the name of the clerk of the peace for the time being, of or in every such county within this realm, where any such robbery and recovery by the party or parties robbed shall be, without naming the Christian name or surname of the said clerk of the peace; which moiety so recovered shall be to the only use and behoof of the inhabitants of the said hundred where any such robbery or felony shall be committed or done.”

*A. What Person is to bring the Action, and make Oath of the Robbery.*

If a servant be robbed, in the absence of his master, of his master’s money, it is clear that the master may maintain an action for it against the hundred; but then the servant must make oath that he knew not any of the robbers.

Raymond v. Hundred of Oking, adjudged, Cro. Car. 37; Ibid. 336, S. P. adjudged, and that the servant was the proper person to make the oath. Styl. 156, S. P. admitted; Latch. 127, S. P., and that the master or servant may bring the action. But the oath must be by the servant, when robbed in the absence of his master. Cro. Eliz. 142, Green’s case adjudged. Leon. 3, 23, S. C. adjudged.—For the statute of 27 Eliz. c. 13, which requires that the party robbed shall make oath within twenty days next before the action brought, that he knew not the robbers, &c., was made, 1st. That the person robbed should enter into a recognisance to prosecute the robbers, if he knew them, or any of them. 2dly, That the hundred might be excused upon the conviction of such person or persons. 3dly, To prevent a robbery by fraud. 3 Mod. 288.—For if the robbery be by combination, the party cannot recover. Show. 94; Carth. 145; Holt, 460.

Also the servant, being robbed in his master’s absence, may himself maintain an action against the hundred, and may (a) declare that he was possessed *ut de bonis suis propriis*, &c. And though the jury find that he was robbed of his master’s money, yet he shall recover; for the servant is possessed *ut de bonis propriis* against all, and in respect of all, but him that hath the very right.

Combs v. Hundred of Bradley, 2 Salk. 613; 4 Mod. 303, S. C.; 12 Mod. 54, S. C.; Comb. 263, S. C. The same law if a carrier be robbed. Hall v. Hundred of Skarrock, 2 Sid. 44. (a) Where a carrier being robbed declared of goods and chattels taken out of his possession; and for want of alleging that he had a property in them,



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adjudged that as to those goods he could not recover. Saund. 379. Pinckney v. the Inhabitants of East Hundred, in Com. Rotel.

The servant being robbed, may bring an action against the hundred; and though the jury find that part of the things belonged to the master, and part to the servant, yet he shall recover for the whole.

Brownl. 155; 3 Mod. 289, S. C. cited.

If a servant be robbed in the presence of the master, the master must sue; and the oath of the master is sufficient.

2 Salk. 613. *Per cur.*

By special verdict it was found, that the plaintiff sent his servant to Smithfield market with fat cattle, where he sold them for 108*l.* and sealed up 106*l.* in four bags, and delivered them to J S, a Quaker, who travelled with him towards home, and they were both robbed; that the servant made oath of the robbery according to the statute; but that the Quaker refused to be sworn; and in an action brought by the master it was holden, that as to the 40*s.* taken from the servant, he should recover; but that as to the 106*l.* taken from the Quaker, he could not, for want of an oath according to the statute; and that the oath being enjoined merely for the benefit of the hundreds, who were oppressed by pretended robberies, the court could not depart from the express words of the statute.

Asheomb v. Hundred of Elthorn, Carth. 145; 2 Salk. 613, S. C.; Show. 94, S. C.; 3 Mod. 287, S. C.

But it seems, the servant, who delivered the 106*l.* to the Quaker, and was present at the robbery, might maintain the action in his own name for all the money; and that his own oath would be sufficient; and that he might declare upon the taking away the money from the Quaker as his servant, who, in truth, was so for this time.

Carth. 146, *per* Holt, C. J., which in Carth. is said to have been done according to the Chief Justice's advice; but in 3 Mod. 288, though the S. P. is admitted, yet, it is said that it could not have been done, because the year was expired within which the action must be brought.

One Jones, and his wife and servant, travelling together, were all robbed of his money, and Jones alone brought the action for the whole money against the hundred, as well for what was taken from his wife and servant as from his own person, and he alone, without his wife or servant, made oath of the robbery; all which matter being found on a special verdict, it was adjudged, that his oath alone was sufficient within the intent of the statute; and although it was further found, that the servant of Jones, who was robbed with his master, knew one of the robbers, whose name was Le-noe, yet Jones had his judgment.

Carth. 146, Jones v. Hundred of Bromley, cited.

So, where one Bird, a laceman of Colliton in Devonshire, and his servant, were coming to London, and leaving the usual great road between Brentford and Hammersmith, rode through a bye-lane near Serjeant Maynard's house to avoid the dust, and in that lane the servant was robbed, in the presence of his master, of a box of lace which was behind him on the back of the horse, to the value of 1200*l.*, and Bird the master alone made oath of the robbery, and brought the action; by the opinion of the C. J. Holt, the oath of the master was sufficient, because being present the goods were in his possession; for the possession of the servant in the presence of his master is the master's possession; and in this case Bird recovered 1000*l.* and had execution.

Carth. 147, Bird v. Hundred of Ossulston, cited.

## (B) Of raising Hue and Cry, &amp;c.

If A and B travelling together are robbed of a sum of money to which they are both jointly entitled, they may both join in an action against the hundred; *secus*, if they had separate and distinct interests.

Dyer, 370 a; Com. Rep. 327. It ought to appear that the plaintiff has the whole property in the money, of which the robbery was committed.

## 5. Of the Notice to be given of the Robbery.

By the 27 Eliz. c. 13, § 11, it is enacted, "That no person or persons that shall happen to be robbed shall have or maintain any action, or take any benefit of the statutes which make the hundred liable, except the same person and persons so robbed shall, with as much convenient speed as may be, give notice and intelligence of the said felony or robbery so committed unto some of the inhabitants of some town, village, or hamlet, near unto the place where any such robbery shall be committed."

In the construction of this clause of the statute it hath been holden,

That if a person be robbed in the highway *in divisis hundredorum*, he need not give notice to the inhabitants of each hundred, but notice to either of them is sufficient.

Cro. Ja. 675, *Foster v. the Hundreds of Speckor and Isleworth*, adjudged.

That alleging notice to have been given at a village near to where the robbery was committed is sufficient, though such village happens to be in a different (a) county; for that strangers are not obliged to take notice of the division of counties.

Cro. Car. 41, adjudged. (a) Or in a different hundred. Cro. Car. 379, adjudged.

That though it be the best course to allege, that notice was given at the place where the robbery was committed, or at some village near the place, yet that notice near the hundred, or near the division of the hundreds where the robbery was committed, is sufficient; and that this shall not be intended the most remote part of the hundred, especially after a verdict.

Cro. Car. 41, adjudged.

If several persons are in company at the time of the robbery, it is said, that notice given by any one of them is sufficient.

Show. 94.

It hath been resolved, that though the notice given be five miles from the place where the robbery was committed, yet it is sufficient; the reason whereof is, because that the party, who is a stranger to the country, cannot have conusance of the nearest place or town.

March, 11, *Sir John Compton's case*.

Also, if the party robbed give notice with as much convenient speed as may be, though he be otherwise remiss in (b) not pursuing the robbers, or refuse to lend his horse for that purpose, yet shall he not lose his action for this, nor the hundred be excused.

(b) March 11; 2 Leon. 82, S. P. agreed *per cur.*

And now by the 8 Geo. 2, c. 16, it is further enacted, "That no person shall have or maintain any action against any hundred, or take any benefit by virtue of the statutes of Winton, or 27 Eliz. c. 13, or either of them, unless he, she, or they shall, over and besides the notice already required by the last of the above-mentioned statutes to be given of any robbery, with as much convenient speed as may be, after any robbery on him, her, or them committed, give notice thereof to one of the constables of the hundred, or to some constable, borsholder, headborough, or tithingman of some town, parish,

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village, hamlet, or tithing, near unto the place wherein such robbery shall happen, or shall leave notice in writing of such robbery at the dwelling-house of such constable, &c.,\* describing in such notice to be given or left as aforesaid, so far as the nature and circumstances of the case will admit, the felon or felons, and the time and place of the robbery, and also shall, within the space of twenty days next after the robbery committed, cause public notice to be given thereof in the London Gazette, therein likewise describing, so far as the nature and circumstances of the case will admit, the felon or felons, and the time and place of such robbery, together with the goods and effects whereof he, she, or they was or were robbed.”

The court of C. P. was equally divided, whether where a part only of what was lost was well described, the party robbed ought to recover for what was well described in the advertisement. *Vide* Chandler against Hundred of Sunning, Barnes, 458. \*The action lies, though the plaintiff, after the robbery, passes by a place where there are two constables, without giving notice, if he did not know of them, though he did not inquire. *Whitworth v. Hundred of Grimshoe*, 2 Wils. 105, 109. *Semb.*—If a man is robbed soon after six, rides through a village without giving notice, tells men on the road, at seven gives notice to an inn-keeper at a town two miles and a half off, and then gives notice to the high constable three miles off, between eight and nine o'clock, it is good notice within this statute. *Ball v. Hundred of Wymersley*, 2 Stra. 1170. If a material description of one of the robbers is not mentioned in the Gazette, it seems the action will not lie. 2 Wils. 105, 109. So it seems, if the whole sum of which the plaintiff is robbed is not mentioned in the Gazette. *Ibid.*

6. *Where the Party must give Bond for the Payment of Costs, in case he does not prevail.*

To this purpose, by the 8 Geo. 2, c. 16, it is enacted, “That before any action be commenced the party shall go before the chief clerk, or secondary, or the filazer of the county wherein such robbery shall happen, or the clerk of the pleas of that court wherein such action is intended to be brought, or their respective deputies, or before the sheriff of the county wherein the robbery shall happen, and enter into a bond to the high constable or high constables of the hundred in which the robbery shall be committed, in the penal sum of 100*l.* with two sufficient sureties to be approved of by such chief clerk, secondary, filazer, or clerk of the pleas, or their respective deputies, or the sheriff of the said county, with condition for securing to such high constable or high constables (who are hereby empowered and required to enter or cause to be entered an appearance and also to defend such action) the due payment of his or their costs, after the same shall be taxed by the proper officer, in case that he, she, or they (the plaintiff or plaintiffs in such action) shall happen to be nonsuited, or shall discontinue his, her, or their action, or in case that judgment shall be given against such plaintiff or plaintiffs on demurrer, or that a verdict shall be given against him, her, or them.”

\* Where the bond is set out to be given before S C, secondary of E V, chief clerk to enrol pleas; this is a good description, though this statute uses the word (secondary) only. *Merriek v. Hundred of Ossulston*, Andr. 115; *Ca. temp. Hardw.* 409. It is sufficient to say, that the bond was given to J H, high constable, without averring that there was but one. *Ibid.*

And it is further enacted by the said statute, § 2, “That when any such bond as above mentioned shall be entered into before the said sheriff, such sheriff shall immediately certify the same in writing to the chief clerk or secondary in the Court of King’s Bench, or his or their deputy, or to the filazer of that county wherein such robbery shall be committed, or his deputy, in case the action be intended to be brought in the Court of Common Pleas; or, if in the Court of Exchequer, to the clerk of the pleas, or his deputy; which certificate shall be delivered by the party or parties robbed

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to the said chief clerk or secondary, or his or their deputy, or to such filazer, or his deputy, or to such clerk of the pleas, or his deputy, before any process shall issue for the commencement of such suit as aforesaid; and such chief clerk, secondary, filazer, or clerk of the pleas, or their respective deputies, or the said sheriff, shall not take any greater fee or reward for making such bond than five shillings over and above the stamp duties; nor shall any sheriff take any greater fee or reward for making, nor shall any such chief clerk, secondary, filazer, or clerk of the pleas, or their respective deputies, take any greater fee or reward for receiving and filing such certificate, than two shillings and sixpence; and such chief clerk, secondary, filazer, or clerk of the pleas, or their respective deputies, and sheriff as aforesaid, are hereby required to deliver over *gratis* (upon reasonable request made for that purpose) all and every such bonds to be by them respectively taken pursuant to this present act, to the high constable or high constables to whose use the same shall be taken as aforesaid."

7. *Of the Oath to be taken of the Robbery, and before whom the same must be.*

By the 27 Eliz. c. 13, § 11, it is enacted, "That no person shall bring or have any action upon and by virtue of either of the statutes against the hundred, except he or they shall first, within twenty days next before such action to be brought, be examined upon his or their corporal oath, to be taken before some one justice of the peace of the county where the robbery was committed, or near unto the same, whether he or they do know the parties that committed the said robbery, or any of them; and if, upon such examination, it be confessed that he or they do know the parties that committed the said robbery, or any of them, that then he or they so confessing shall, before the said action be commenced or brought, enter into sufficient bond by recognisance before the said justice before whom the said examination is had, effectually to prosecute the same person and persons so known to have committed the said robbery, by indictment or otherwise, according to the due course of the laws of this realm."

In the construction of this clause of the statute the following points have been holden.

That if the party does not know the robbers at the time of the robbery committed, though he happens to know them afterwards, it is not material. March, 11.

It was holden by three judges against one, that the party's swearing that he did not know the robbers, without adding, nor any of them, is not sufficient; because not pursuant to the statute; and because on such equivocal oath the party cannot be punished for perjury.

Bateman's case, Noy, 21. And to the opinion of the three judges, Powel, J., in the case of *Pye v. Hundred of Westbury*, 3 Lev. 328, inclined; but Rokesby, J., *contra*, who held, that if a person swears that he was robbed by four persons unknown to him, all the four must be unknown to him.

|| Though the party robbed knows all or any of the offenders, he may nevertheless bring an action against the hundred, only he must first enter into a recognisance to prosecute the offenders.

Lord Compton's case, Noy, 155.||

[Though the robbery were 20 miles from the place where the justice lived, and though it were proved that there were many justices lived nearer, yet Abney, J., held it sufficient on a case reserved, saying, the act was only directory in that respect.

Lake v. Hundred of Croydon, Bull. Ni. Pri. 186.||]

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It hath been adjudged, that the oath may be taken before a justice of the county, though not in the county at the time of administering it; as, where a robbery was committed in Berks, and a justice of that county residing in London, the party was sworn before him according to the statute in London, and it was holden sufficient; for the justice acts only as (a) a ministerial officer, and as appointed by the statute, and not in a judicial capacity as a justice of the peace.

Cro. Car. 211; Jones, 239; *Helier v. Hundred de Benhurst*. (a) And as his office herein is purely ministerial, it is said, that if he refuses to take the oath of examination of the party, an action on the case will lie against him. Leon. 323; Sid. 209.

If in an action on the statute of hue and cry it be alleged, that the oath was taken before a justice of peace of Yorkshire; this will be sufficient, although objected, that there is no such justice, because that in every riding they have several commissions.

Vide 2 Sid. 45.

[It is sufficient for the plaintiff to prove, that he who took the affidavit acts as a justice of the peace, and it shall be read upon proof that it was delivered by his clerk to the person producing it, without proving the justice's hand.

*Per Parker, C. J., at Hertford, 1722; Bull. Ni. Pri. 186.*

It is not necessary for the justice to take the examination in writing; but if he appear at the trial, and depose the substance of the usual affidavit, it is sufficient.

*Graham v. Hundred of Becontree, Essex, per Wythens, J., 1683; Bull. Ni. Pri. 186.*

But, if the justice has taken the substance of the usual affidavit in writing, and that is produced in evidence, he shall not be permitted to give evidence at the trial of any thing else the plaintiff said on his examination, viz., any description of the robbers or robbery different from what he shall give on the trial.

*Kemp. v. Hundred of Stafford, Tr. 19 G. 2, C. B. Bull. Ni. Pri. 186.]*

|| Although the declaration, since the making of this statute, always avers, that the plaintiff gave notice to the inhabitants of the robbery, and that he made an oath before a justice of the peace that he did not know the offenders; yet it is holden not to be necessary to do so; because the declaration is founded on the statute of Winton, which requires no such things to be done, and this statute of 27th of Elizabeth is only directory, and its directions need not be inserted in the declaration. But, if there is such an averment, it is not necessary to state that the justice before whom the oath was taken was a justice at the time of its being taken.

*Dowly v. Hundred of Odium, 2 Salk. 614; 2 Saund. 376, n. 5; Merick v. Hundred of Ossulston, Ca. temp. Hardw. 409; Andr. 115, S. C.||*

#### 8. *At what Time the Action is to be brought.*

By the 27 Eliz. c. 13, § 9, it is enacted, "That no person or persons robbed shall take any benefit by virtue of the statutes, to charge any hundred where any such robbery shall be committed, except he or they so robbed shall commence his or their suit or action within (a) one year next after such robbery committed."

(a) By 8 G. 2, c. 16, § 14, no action can be brought but within six months.

In the construction whereof it hath been holden:

That if a person be robbed the 9th of October, 13 Ja., and so laid, and

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the teste of the writ be the 9th of October, 14 Ja., that this is not pursuant to the statute; and that in this action, which is penal against the hundred, there is no reason to exclude the day on which the fact was done, nor to make such construction as is done in protections and the enrolment of deeds, which have always received a benign interpretation.

Hob. 139, 140; Moor, 878; Brownl. 156, S. C.; Norris v. Hundred of Gawtry, cited by Lord Mansfield, Dougl. 465.

In an action on the statute of hue and cry, the plaintiff made oath according to the statute, and within twenty days brought a writ, and because it was vicious, let it fall; and after the twenty days took out a new one, without making any oath anew, or entering any continuances between the said writ and that; and the court held clearly, that the second writ was not brought according to the statute; for so, they said, that provision in the statute would be to no manner of purpose.

Newman v. Inhabitants of Stafford, 1 Sid. 139; 1 Keb. 495, S. C.

An action was brought by the master, on the statute of Winton, for a robbery committed on his servant, in which he declared of an assault and battery done to himself, (though then fifty miles from the place;) also that he made oath that he did not know any of the persons; the issue was entered of record, and the jury appeared at the bar ready to try it; but being for other business adjourned to another day, the plaintiff, observing his mistake, moved to amend, by declaring of a robbery on his servant, &c., and it appearing that the year in which the action must be brought was expired, and, consequently, the action must be lost if not allowed, (a) the court after long debate and consideration of former precedents admitted him to amend.

3 Lev. 347, Bearecroft v. Hundred of Burnham and Stone. (a) [Upon this ground an original hath been allowed to be filed in this action, after a writ of error brought for the want of it. 1 P. Wms. 412. So, an original bespoken within the year, and tested on that day, is good, though it do not pass the great seal, till after the year has expired. Price v. Hundred of Chewton, Ibid. 347.]

[The plaintiff need not prove the robbery in the place or in the parish alleged in the declaration, if it be proved within the same hundred. So, hue and cry need not be proved by the plaintiff, though alleged in his declaration, for it is the part of the hundred to levy it.

Owen, 70, *Per* Holt, 5 Ann. at Maidstone, Bull. Ni. Pri. 187.]

#### 9. *What Evidence will maintain the Action; and therein of the Witnesses for and against it.*

It seems that from the necessity of the case, the party himself that was robbed is to be admitted as a witness: but then his testimony must be corroborated by collateral proof and circumstances, and such as may induce a jury to believe that a robbery was actually committed, that the party lost what he declared for.

2 Leon. 12; 10 Mod. 193; Fortesc. Rep. 246; Gilb. Cas. 113; 12 Vin. Abr. 13.

But it was holden, that in an action against the hundred, no inhabitant of the hundred could be a witness, because he was concerned in interest.

Vent. 351, 713; Mod. 73.

But now by the 8 Geo. 2, c. 16, reciting, "that by the laws then in being, the person or persons robbed may be admitted, in any action to be brought against the hundred, as a witness to prove the robbery, and the money, goods, or effects whereof he, she, or they, was or were robbed; and yet no person inhabiting within the said hundred can be admitted as a witness for or on

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behalf of the said hundred, by reason of the interest he or she may have in the consequences of the said action, which is commonly very inconsiderable; therefore it is enacted, That in an action already brought, or to be brought, against any hundred on either of the statutes, any person inhabiting within the said hundred, or any franchise thereof, shall be admitted as a witness for or on behalf of the said hundred, in the same manner as if he or she were not an inhabitant thereof, but resided in any other hundred whatsoever."

10. *What shall excuse the Hundred; and therein of apprehending the Robbers.*

By the statutes of Winton, 13 E. 1, c. 1, and 28 E. 3, c. 11, the robbers must be taken within forty days after the robbery committed: also by the former act it was necessary that all the robbers should be taken to excuse the hundred.

2 Inst. 569; 3 Lev. 320; Dyer, 370 a; 7 Co. 7; Sid. 11.

But now as to this latter matter, by the 27 Eliz. c. 13, § 8, it is enacted, "That wherever any robbery is or shall be hereafter committed by two or a greater number of malefactors, and that it happen any one of the said offenders be apprehended by pursuit, to be made according to the said former mentioned laws and statutes, or according to this present act; that then, and in such case, no hundred or franchise shall in any wise incur or fall into the penalty, loss, or forfeiture mentioned either in this present act, or in any the said former statutes, although the residue of the said malefactors shall happen to escape, and not be apprehended; any thing in this statute, or in the said former statutes, to the contrary notwithstanding."

If a robbery be committed, and hue and cry made, and afterwards, within the forty days, an inhabitant of the hundred find one of the robbers in the presence of a justice of the peace, and charges him with the robbery, and the justice promises that he shall appear and be forthcoming, this is a taking within the statute; for being in the presence of the justice, it must be understood that he was in his custody and power, and therefore not necessary to lay hold on him.

*Methwin v. Hundred of Thistleworth*, Vent. 118, 325; Raym. 221; 2 Lev. 4, S. C.

|| So, if the robber be found in jail for another offence, and is indicted for the robbery: though a taking upon suspicion, if he be acquitted, will not suffice.

Dy. 370 a. in marg.||

If hue and cry be made towards one part of the county, and an inhabitant of the hundred apprehend one of the robbers within another, this is a taking within the statute.

Vent. 118, 119, *per Hale*, C. J.

|| It is no plea for the hundred to say, that they made fresh suit, if they do not add, that they took some of the offenders.

Dy. 370 a.

In an action against the hundred of Gravesend for a robbery on Gads-hill, it seemed hard, says the book, to the inhabitants, that they should answer for robberies committed on Gads-hill, because they are so frequent, that if the inhabitants should answer for all of them, they would be utterly undone. And Harris, Serjt., was of counsel for the hundred, and pleaded, "that time out of mind, &c., *felons had used to rob on Gads-hill*, and so prescribed to be discharged;" but the inhabitants were adjudged to be chargeable.

2 Leon. 12.||

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By the 8 Geo. 2, c. 16, § 3, it is enacted, "That no hundred or franchise therein, shall be chargeable, by virtue of any of the statutes, if any one or more of the felons, by whom such robbery shall be committed, be apprehended within the space of forty days next after public notice given in the London Gazette, as by the statute is provided."

But this must be pleaded, and not given in evidence on the general issue.

And by the said statute 8 Geo. 2, § 9, "to the intent that hue and cry may be made with more diligence and effect, and other persons encouraged to take such felon or felons, it is enacted, that any person or persons who shall apprehend such felon or felons within the time hereinbefore limited for that purpose, whereby the hundred hath been actually indemnified or discharged from any such action as aforesaid, shall, upon due proof thereof, upon oath made before two justices of the peace, (which oath the said justices are hereby also empowered and required to administer,) be entitled to the reward of 10*l.*, which sum shall be raised upon the hundred by a taxation and assessment, to be made and to be levied and collected in the same manner as the other sums of money, by this present act appointed to be raised upon the hundred, are directed to be assessed, levied and collected; and such sum of 10*l.* which shall be so rated, assessed, levied and collected as aforesaid, shall be paid unto two such justices of the peace, within ten days next after the same shall be so levied and collected, to the use of the person or persons who shall be thereunto entitled, as a reward for having so apprehended such felon or felons, as aforesaid; and such justices shall, upon reasonable request made for that purpose, pay over and deliver the said sum to such person or persons accordingly, in such shares and proportions as the said justices shall think reasonable; provided always, that such person or persons, so entitled to such reward, shall not thereby be rendered incapable to be a witness in any such action."

11. *How the Money is to be levied, and each Hundredor to contribute to the Charges.*

By the 27 Eliz. c. 13, § 4, reciting, "that although the whole hundred, where such robberies and felonies are committed, with the liberties within the precinct thereof, are charged by the former statutes with the answering to the party robbed his damages; yet nevertheless the recovery and execution, by and for the party or parties robbed, is had against one or a very few persons of the said inhabitants, and he and they so charged have not heretofore had any mean or ways to have any contribution of or from the residue of the said hundred where the said robbery is committed, to the great impoverishment of them against whom such recovery or execution is had."

By § 5 of the said statute it is enacted, "That, after execution of damages by the party or parties so robbed had, it shall and may be lawful (upon complaint made by the party or parties so charged) to and for two justices of the peace (whereof one to be of the *quorum*) of the same county, inhabiting within the said hundred, or near unto the same, where any such execution shall be had, to assess and tax rateably and proportionably according to their discretions, all and every the towns, parishes, villages, and hamlets, as well of the said hundred where any such robbery shall be committed, as of the liberties within the said hundred, to and towards an equal contribution to be had and made for the relief of the inhabitant or inhabitants against whom the party or parties robbed before that time had his or their execution; and that after such taxation made, the constables or constable, headboroughs or headborough, of every such town, parish, village, and hamlet,



(B) Of raising Hue and Cry, &amp;c.

shall, by virtue of this present act, have full power and authority, within their several limits, rateably and proportionably to tax and assess, according to their abilities, every inhabitant and dweller in every such town, parish, village, and hamlet, for and towards the payment of such taxation and assessment, as shall be so made; and that if any inhabitant of any such town, parish, village, or hamlet, shall obstinately refuse and deny to pay the said taxation and assessment, so by the said constables or constable, headboroughs or headborough, taxed and assessed, that then it shall and may be lawful to and for the said constables and headboroughs, and every of them, within their several limits and jurisdictions, to distrain all and every person and persons so refusing and denying by his and their goods and chattels, and the same distress to sell; and if the goods or chattels so distrained and sold shall be of more value than the said taxation shall come unto, that then the residue of the said money over and above the said taxation shall be delivered unto the said person or persons so distrained."

And it is further enacted, by § 6, "That all and every the said constables and headboroughs, after that they have, within their several limits and jurisdictions, levied and collected their said rates and sums of money so taxed, shall, within ten days after such collection, pay and deliver the same over unto the said justices of peace, or one of them, to the use and behoof of the said inhabitant or inhabitants, for whom such rate, taxation, and assessment shall be had or made, as aforesaid; which money so paid shall, by the justices or justice so receiving the same, be delivered over (upon request made) unto the said inhabitant or inhabitants, to whose use the same was collected."

And it is further enacted, § 7, "That the like taxation, assessment, levying by distress, and payment as aforesaid, shall be had and done within every hundred where default or negligence of pursuit and fresh suit shall be, for and to the benefit of all and every inhabitant and inhabitants of the same hundred where such default shall be, that shall at any time hereafter, by virtue of this present act, have any damages or money levied of them, for or to the payment of the one moiety, or half of the money recovered against the said hundred, where any robbery shall be committed."

It hath been adjudged, that a person occupying lands in a hundred, although he hath no house or dwelling there, is an inhabitant within the meaning of the statute, for that otherwise the statute might be eluded.

Leigh v. Chapman, 2 Saund. 423; Jeffrey's case, 5 Co. 60 b; Atkins v. Davis, Cald. 315.

It is said that a person, though not an inhabitant at the time of the robbery committed, but becoming one before the judgment, shall contribute to the charges.

March 11, but *Hut*, 125, S. P. *cont*.

And now, for the more equal rating and levying the money, for which the hundreds are chargeable, by the 8 Geo. 2, c. 16, it is enacted, "That no process for appearance in any action brought upon the said statutes, or either of them, against any hundred, shall be served on any inhabitant thereof, save only upon the high constable, or high constables, of the hundred wherein the robbery shall happen, who is and are hereby required to cause public notice thereof to be given in one of the principal market-towns within such hundred on the next market-day after he or they shall be served with such process; or if there shall happen to be no market-town within such hundred, then in some parish church within the hundred, immediately after

divine service, on the Sunday next after his or their being served with such process; and he or they is and are also hereby empowered and required to enter, or cause to be entered, an appearance in the said action, and also to defend the same for and on behalf of the inhabitants of the said hundred, as he or they shall be advised; and in case the plaintiff or plaintiffs in such action shall recover and obtain judgment therein, that then no process of execution shall be served on any particular inhabitant or inhabitants of the said hundred, or any franchise within the precincts thereof, nor on the said high constable or high constables; but the sheriff, or his officer, shall, upon the receipt of any writ or writs of execution to him directed, in pursuance of the said judgment, (instead of serving the said writ or writs on any inhabitant or inhabitants) cause the same to be produced and shown *gratis*, unto two justices of the peace of the county, riding, or division, (whereof one to be of the *quorum*,) and residing within the said hundred, or near unto the same, who shall thereupon, with all convenient speed, cause such taxation and assessment to be made, and to be levied and collected in such manner as is prescribed in and by the aforesaid statute 27 Eliz., in which taxation and assessment there shall be provided for and included, over and above what the costs and damages recovered by the plaintiff or plaintiffs in such action shall amount to, all such just and necessary expenses which any high constable or high constables of any hundred hath or have been or shall be at, in having defended any such action, as aforesaid, claim being made thereto by such high constable or high constables, before the said justices, upon due notice being given to him or them by the said justices for that purpose; and the sums of money so to be levied and collected shall be paid over and delivered, (by such officer or officers as by the said statute, 27 Eliz., are to levy and collect the same,) within ten days after such collection, to the sheriff of the county wherein the robbery shall happen, to the use and behoof of the plaintiff or plaintiffs in such action, for so much as the costs and damages by him, her, or them recovered shall amount to, and to the use and behoof of the said high constable or high constables, for so much as his or their expenses in defending the said action shall amount to, of which the said high constable or high constables shall give in an account, and make due proof upon oath to the satisfaction of the said justices, before any such taxation and assessment shall be made for the reimbursing such high constable or high constables, (which oath the said justices are hereby authorized and required to administer,) and shall in such expenses have no further allowance towards paying an attorney to defend the said action, than what such attorney's bill shall be taxed at by the proper officer of that court where such action shall be brought, which the said high constable or high constables shall cause to be taxed for that purpose."

By stat. 22 Geo. 2, c. 46, § 34, no writ of execution to be sued out against the inhabitants of any hundred, on any judgment obtained by virtue of any act or acts of parliament whatsoever, shall be levied on any particular inhabitant or inhabitants of such hundred; but the sheriff shall, on receipt of every such writ, cause the same to be produced to two justices of the peace, in such manner as is directed by 8 G. 2, c. 16, § 4; and that thereupon the said justices shall, in the manner directed by the said act, cause a taxation to be made, levied, and collected for raising and paying as well the costs and damages recovered by the plaintiff or plaintiffs, as also all such just and necessary expenses as any inhabitant or inhabitants of such hundred shall have been at in defending any such action; the same being first proved on oath, and the attorney's bill being first taxed, in such manner as the act directs; and the sums of money so to be levied and collected shall, within the time by the said act limited, be paid to the sheriff or sheriffs, and by him or them paid or delivered over to the persons entitled to receive the same, without deduction, fee, or reward whatsoever.

(B) Of raising Hue and Cry, &amp;c.

And it is further enacted, § 5, "That the sum or sums of money which shall be paid over and delivered to the sheriff of the county, as herein-before mentioned, shall (upon reasonable request made) be by him paid and delivered over to the several parties who shall be entitled to receive the same, without any deduction, fee, or reward whatsoever."

§ 6. "And that sufficient time may not be wanting for such taxation and assessment to be duly made, and for the money to be collected and levied thereupon after such writ or writs of execution shall be shown to such justices, and before the sheriff shall be obliged to make a return thereof, it is enacted, that no sheriff shall be called upon or required to make any return to any such writ or writs of execution, as shall issue or be made out upon any judgment which shall be recovered in any action brought against any hundred by virtue of the above-mentioned statutes, or either of them, until after the expiration of sixty days next after the day whereupon such writ or writs shall be delivered to the said sheriff, who is hereby required to endorse on the back thereof the day on which he received the same." (a)

|| (a) It will be sufficient for the sheriff, after the lapse of the sixty days without any levy made, to return that he has delivered the writ to the justices of the hundred, and that they have done nothing upon it. *Wright v. Inhabitants of the Lath of St. Augustine*, 13 East, 544.||

§ 7. "And whereas it is reasonable that the said high constable or high constables should be indemnified as to all charges which he or they shall necessarily expend in defending any suit in pursuance of this present act, and that provision should be made for reimbursing him or them not only such expenses as shall be over and above the taxed costs to be paid by the plaintiff or plaintiffs, in case of a nonsuit, discontinuance, or judgment on demurrer against him, her, or them, or verdict for the defendants as aforesaid, but even such taxed costs also, in case the plaintiff or plaintiffs, and his, her, or their sureties who shall be bound for the payment thereof, shall happen to become insolvent; it is therefore enacted, that if any plaintiff or plaintiffs in an action to be brought against any hundred, upon the statutes above-mentioned, or either of them, shall be nonsuited, or shall discontinue his, her, or their action, or shall have a judgment on demurrer given, or a verdict pass against him, her, or them, it shall and may be lawful for any two justices of the peace, (such as are herein-before mentioned,) upon complaint to them made for that purpose, and upon an account given in by such high constable or high constables, and proof made upon oath, to the satisfaction of the said justices, of the expenses necessarily laid out as aforesaid, (which oath the said justices are hereby empowered and required to administer,) to make and cause such taxation and assessment to be made, and to be levied and collected in such manner as is directed in and by the above-mentioned statute of 27 Eliz., in order thereby to reimburse such high constable or high constables all such charges as he or they shall have necessarily expended in defending such action, wherein such plaintiff or plaintiffs shall have been nonsuited, or shall have discontinued his, her, or their action, or against whom judgment shall have been given upon demurrer, or a verdict shall have been given, over and above the costs in those cases to be taxed as aforesaid; and in case it shall be made appear upon oath to the said justices of the peace, (which oath the said justices are hereby also empowered and required to administer,) to their satisfaction, that such plaintiff or plaintiffs, and also his or their sureties, is and are insolvent, so that the said high constable or high constables can have no relief

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as to such taxed costs by them expended in such defence as aforesaid, (save only by the power hereinafter given to the said justices,) it shall and may be lawful to and for such two justices of the peace to make and cause a taxation and assessment to be made, and to be levied and collected in the same manner as is directed in and by the aforesaid statute made 27 Eliz., in order thereby to reimburse such high constable or high constables such taxed costs, as by reason of such insolvency he or they shall not be able to recover and receive of and from the plaintiff or plaintiffs in the action, or his or their sureties as aforesaid."

See Fitzgib. 296, pl. 4.

§ 8. And it is further enacted, "That the several sum or sums of money, which shall be so rated and assessed, and levied and collected as aforesaid, for the reimbursement of the expenses necessarily sustained by any high constable or high constables in defence of any action brought against the hundred upon the statutes above mentioned, or either of them, in case of any judgment given against the plaintiff or plaintiffs, shall be paid within ten days after such collection, unto the said justices, or one of them, to the use and behoof of such high constable or high constables, to whom the said justices shall, upon request, pay over and deliver the same."

§ 10. And it is further enacted, "That the justices of peace, by whom such taxations and assessments as aforesaid shall, in pursuance of the said statute made 27 Eliz. and also of this present act, be made, shall limit and appoint, at their discretion, some certain reasonable time within which such taxations and assessments shall be levied and collected, which time shall not exceed thirty days; and also, that if any officer or officers, who are to levy and collect such taxations and assessments as aforesaid, shall refuse or neglect to levy and collect the same within such time as shall be limited and appointed by the said justices of the peace for their doing thereof, or shall refuse or neglect to pay and deliver over the sums of money so levied and collected to the said sheriff, and also to the said justices, in such manner as the same in the several cases herein-before mentioned are respectively directed to be paid, within the respective times herein-before limited for such payment thereof, every such officer shall, for every such refusal or neglect, forfeit double the sum appointed to be by him levied and collected as aforesaid."

By (a) stat. 22 Geo. 2, c. 24, "No person whatsoever shall recover against any inhabitant or inhabitants of any hundred, in any action on any of the statutes of hue and cry, more than the value of 200*l.*, unless the person or persons so robbed shall at the time of such robbery for which such action shall be brought, be together in company, and be in number two (b) at the least, to attest the truth of his or their being so robbed."

(a) The case of Chandler, an attorney at law, who sued the Hundred of Sunning in Berks, in the year 1748, which was attended with many suspicious circumstances, and for a very large sum of money, occasioned this act. (b) I give the act verbatim as I find it.—By stat. 30 Geo. 2, c. 3, § 11, and 4 Geo. 3, c. 2, § 118, receivers of the land-tax shall not sue the county for a robbery, unless there were three persons in company carrying the money.

[Here let it be observed, that as the statute of Winton incorporates the hundred, so as to subject them to be sued, it, by consequence, gives them the capacities attaching upon the character of defendants: they may therefore sue the plaintiff (c) for the costs of a nonsuit; they may bring a *scire*

(C) Of other Statutes giving similar Actions, &c.

*facias*, or an action of debt upon the judgment; or proceed against the sheriff for an escape.

Fitzgib. 296. (c) See as to this stat. 22, *supr*.

|| The statutes 27 Eliz. c. 13; 8 G. 2, c. 16; and 22 G. 2, stated and recited under this head, are wholly repealed by the 7 & 8 G. 4, c. 27; and the stat. of Winton, 13 Edw. 1, c. 1, is repealed, except as to so much as forbids fairs and markets being kept in churchyards. By the repeal of these statutes, for which no provisions are substituted, the liability of the hundred to persons robbed is entirely done away.||

|| (C) Of other Statutes giving similar Actions against the Hundred.

By 1 Geo. st. 2, c. 5, § 4, commonly called *the Riot Act*, “If any person unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down any church or chapel, or any building for religious worship, certified and registered according to the statute made in the first year of the reign of the late King William and Queen Mary, intituled, *An Act for exempting their majesties’ Protestant subjects dissenting from the Church of England from the penalties of certain laws*, or any dwelling-house, barn, stable, or other out-house, that then every such demolishing, or pulling down, or beginning to demolish or pull down, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death, as in case of felony, without benefit of clergy.

Extended to the pulling down and demolishing of mills by 9 G. 3, c. 29.

§ 6. “If any such church or chapel, or any such building for religious worship, or any such dwelling-house, barn, stable, or other out-house, shall be demolished or pulled down wholly or in part by any persons so unlawfully, riotously, and tumultuously assembled, that then, in case such church, chapel, building for religious worship, dwelling-house, barn, stable, or out-house, shall be out of any city or town that is either a county of itself, or is not within any hundred, that then the inhabitants of the hundred in which such damage shall be done shall be liable to yield damages to the person or persons injured and damnified by such demolishing or pulling down wholly or in part; and such damages shall and may be recovered by action to be brought in any of his majesty’s courts of record at Westminster (wherein no essoin, protection, or wager, or law, or any imparlance, shall be allowed) by the person or persons damnified thereby against any two or more of the inhabitants of such hundred, such action for damages to any church or chapel to be brought in the name of the rector, vicar, or curate of such church or chapel that shall be so damnified, in trust for applying the damages to be recovered in re-building or repairing such church or chapel; and that judgment being given for the plaintiff or plaintiffs in such action, the damages so to be recovered shall, at the request of such plaintiff or plaintiffs, his or their executors or administrators, to be raised and levied on the inhabitants of such hundred, and paid to such plaintiff or plaintiffs in such manner and form, and by such ways and means, as are provided by the statute made in the seventh-and-twentieth year of the reign of Queen Elizabeth for re-inbursing the person or persons on whom any money recovered against any hundred by any party robbed shall be levied. And in case any such church, chapel, building for religious worship, dwelling-house, barn,

(C) Of other Statutes giving similar Actions, &c.

stable, or out-house, shall be in any city or town, that is either a county of itself, or is not within any hundred, then the action is to be brought against two or more of the inhabitants of such city or town."

As the action under this statute is given against *any two of the inhabitants*, there would seem to be no occasion to sue out a special original as in an action on the statute of Winton, but the proceeding may be, as against any other individuals, by bill in B. R. or by common capias in C. B.

2 Saund. 377, b n, 12.

Before this statute was passed, the demolishing of a house was a mere trespass, for which the party injured was entitled to an action against the wrong-doer; this statute makes the trespass a felony, and, consequently, deprives the party injured of his remedy; the civil action being merged in the felony: the statute therefore gives him the action against the hundred in the lieu of that which it had taken away, and imposes on the hundred those damages to which the original trespasser was liable. It follows, therefore, that the hundred are answerable only for damage done by such an act as was before only a trespass, and is now made by the statute a felony; but not for damage done by any act of persons riotously assembled, which is a distinct felony independently on the statute, or by any act which does not amount to a felony within the fourth clause of the statute. If the act of the rioters does not indicate the purpose which gives it its felonious character under that clause; if the mob demolish part of the house, but not with an intent actually to demolish the whole; then they have not begun to do that act which constitutes the felony; what they have done forms no part of it: and, consequently, the hundred is not chargeable. The liability of the hundred is bounded by the feloniousness of the act within this clause. But though this be so, yet, as the sixth clause of the statute is considered a remedial law, and therefore entitled to a liberal (a) construction; if the rioters demolish and pull down a dwelling-house, and *at the same time destroy the goods and furniture* in it; although such goods and furniture were not destroyed *by means* of the pulling down of the house, and although the words of the statute are only "dwelling-house, barn, stable, or other out-house;" yet, as the whole is one and the same act committed at one and the same time, the hundred is liable to yield damages for the destruction of the furniture as well as of the house. (b)

Ratcliffe v. Eden, Cowp. 485; Hyde v. Cogan, Dougl. 699; Wilmot v. Horton, there cited; Burrows v. Wright, 1 East. 615; Greasley v. Higginbottom, Ibid. 636; Beckwith v. Wood, 1 Barn. & Ald. 485; Reid v. Clarke, 7 T. R. 496; Lord King v. Chambers, 4 Campb. 37. (a) This statute is said to be remedial as to the party grieved; but penal as to the hundred; the same clause therefore as between the same parties at once is to be construed liberally, and to be pursued strictly. (b) The reasoning in the text being somewhat strained, it is enacted by 57 G. 3, c. 19, § 38, "that in every case where any house, shop, or other building whatever, or any part thereof, shall be destroyed, or shall be in any manner damaged or injured, or where any fixtures thereto attached, or any furniture, goods, or commodities whatever, which shall be therein, shall be destroyed, taken away, or damaged by the act or acts of any riotous or tumultuous assembly of persons, or by the act or acts of any person or persons engaged in or making part of such riotous or tumultuous assembly, the inhabitants of the city or town in which such house, shop, or building, shall be situate, if such city or town be a county of itself, or is not within any hundred, or otherwise the inhabitants of the hundred in which such damage shall be done, shall be liable to yield full compensation in damages to the person or persons injured and damnified by such destruction, taking away, or damage; and such damages shall and may be demanded, sued for, and recovered by the same means, and under the same provisions as are provided in and by an act passed in the first year of King George the first, intituled, "*An Act for preventing tumults*

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*and riotous assemblies, and for the more speedy and effectually punishing the rioters,"* with respect to persons injured and damnified by the demolishing and pulling down of any dwelling-house by persons unlawfully, riotously, and tumultuously assembled."

A house, part of which was occupied by the plaintiff as a shop, and the remainder by lodgers, no part of his family sleeping there, was adjudged to be a dwelling-house within the protection of this act, the term dwelling-house being used in the statute as a word of general description of the kind of property intended to be protected.

Rea v. Wood, 2 Stark, 269.

It is not necessary to the support of the action against the hundred to prove that *twelve* rioters were assembled at the time of the demolition of the house; for though in the first and third clauses of the act the number *twelve* is particularly mentioned as descriptive of the offence thereby created; yet it is omitted in the fourth clause, which makes it felony to demolish any dwelling-house, &c., and also in the sixth clause, which gives the action against the hundred; and this last being, as we have seen above, a remedial law, makes the consideration of the number assembled less important.

Pritchit v. Waldron, 5 T. R. 14.

This action may be maintained by a trustee in whom the legal estate is vested for existing purposes; and, it would seem, even by a bare trustee of a satisfied term.

Pritchit v. Waldron, 5 T. R. 14.

The plaintiff is entitled to his costs in this action as well as in one upon the statute of *hue and cry*.

Witham v. Hill, 2 Wils. 91; Radcliffe v. Eden, Cowp. 487. *Supra*, tit. "*Costs*," vol. ii. p. 485.

It seems that a writ of execution sued out by the party who has recovered damages against the hundred upon this act, and delivered by the sheriff to the justices, is, under the statute of 8 Geo. 2, c. 16, a sufficient foundation for an order to levy the amount. But the order of the justices directing the money when levied to be paid into the hands of a banker, subject to their further order, is bad; the act requiring payment to the party entitled. It seems, also, that the order for levying the damages ought to be upon the inhabitants of the "*towns, parishes, villages, and hamlets*," pursuant to the statute 27 Eliz., and not upon the inhabitants of the "*districts and parishes*" within the hundred.

R. v. Inhabitants of the Hundred of Halfshire, 5 T. R. 341.

By 9 Geo. c. 22, commonly called the Black Act, it is enacted, "that if any person or persons shall unlawfully and maliciously kill, maim, or wound any cattle, or cut down or otherwise destroy any trees planted in any avenue, or growing in any orchard, garden, or plantation, for ornament, shelter, or profit, or shall set fire to any house, barn or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood, every person so offending shall be adjudged guilty of felony without benefit of clergy."

§ 7. "The inhabitants of every hundred shall make full satisfaction and amends to all and every the person and persons, their executors and administrators for the damage they shall have sustained or suffer by the killing or maiming of any cattle, cutting down or destroying any trees, or setting fire to any house, barn, or out-house, hovel, cock, mow, or stack of corn, straw, hay, or wood, which shall be committed or done by any offender or offenders against this act; and that every person and persons who shall

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sustain damages by any of the offences last mentioned, shall be and are hereby enabled to sue for and recover such his or their damages, the sum to be recovered not exceeding the sum of 200*l.* against the inhabitants of the said hundred, who by this act shall be made liable to answer all or any part thereof; and if such person or persons shall recover in such action, and sue execution against any of such inhabitants, all other the inhabitants of the hundred who by this act shall be made liable to all or any part of the said damage, shall be rateably and proportionably taxed for and towards an equal contribution for the relief of such inhabitant against whom such execution shall be had and levied; which tax shall be made, levied, and raised by such ways and means, and in such manner and form as is prescribed and mentioned for the levying and raising damages recovered against inhabitants of hundreds in case of robberies in and by the 27 Eliz."

§ 8. "Provided, nevertheless, that no person or persons shall be enabled to recover any damages by virtue of this act, unless he or they, by themselves or their servants, within two days after such damage or injury done him or them by any such offender or offenders, as aforesaid, shall give notice of such offence done and committed unto some of the inhabitants of some town, village, or hamlet near unto the place where any such fact shall be committed, and shall within four days after such notice give in his, her, or their examination on oath, or the examination upon oath of his, her, or their servant or servants that had the care of his or their houses, out-houses, corn, hay, straw, or wood, before any justice of the peace of the county, liberty, or division where such fact shall be committed, inhabiting within the said hundred where the said fact shall happen to be committed, or near unto the same, whether he or they do know the person or persons that committed such fact, or any of them; and if upon such examination it be confessed that he or they do know the person or persons that committed the said fact, or any of them, that then he or they so confessing shall be bound by recognisance to prosecute such offender or offenders by indictment or otherwise, according to the laws of this realm."

There is a clause in the act of 52 G. 3, c. 130, § 4, almost in the very words of this act; and in an action against the hundred upon that statute by several partners to recover the value of a building feloniously destroyed, it seemed to the court that it was not sufficient for one only of them to give in his examination upon oath, for that all the partners present when the fact was committed, who were in this case three in number, ought to have joined in the examination; but they were clear that, in all events, the affidavit should have denied all knowledge in the other partners, of the person who committed the fact, to the best of the deponent's belief. *Nesham v. Armstrong*, 1 Barn. & Ald. 147.

§ 9. "Provided also, that where any offence shall be committed against this act, and any one of the said offenders shall be apprehended and lawfully convicted of such offence within the space of six months after such offence committed, no hundred or any inhabitant thereof shall in anywise be subject or liable to make any satisfaction to the party injured for the damages he shall have sustained."

§ 10. "Provided also, that no person who shall sustain any damage by reason of any offence to be committed, by any offender contrary to this act, shall be thereby entitled to sue or bring any action against any inhabitants of any hundred where such offence shall be committed, except the party or parties sustaining such damage shall commence his or their action or suit within one year next after such offence shall be committed."

The action under this statute being against the hundred, must of course



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be commenced by original. But this action, as well as that under the 1 G. must be brought by the party grieved, and not (as it has sometimes been brought, 3 Wils. 318) by a common informer. And it will not lie, unless the act which occasioned the damage amounts to a felony within the statute.

2 Saund. 378, d. n. (12.)

Although the words in the first section of the act are "*unlawfully and maliciously*," yet it is not necessary to use those precise words in the declaration; therefore where the action was for the damages sustained by setting fire to two stacks of oats and a barn, which in the declaration was laid to have been *feloniously* done by some person or persons unknown; after verdict for the plaintiff, it was moved in arrest of judgment, that the declaration was bad, because it was not alleged that the act was done *unlawfully and maliciously* according to the words of the statute. But the court were unanimously of opinion that it was not necessary; for although the burning must be unlawful and malicious to constitute the offence, yet the statute does not make use of any technical words that are absolutely necessary to be inserted in the declaration, but leaves the plaintiff to allege and prove *quo animo* the oats and barn were set on fire: here he has alleged it was committed feloniously; and it must be presumed after verdict that it was done unlawfully and maliciously.

Allen v. Hundred of Kirton, 3 Wils. 318; 2 Bl. Rep. 842, S. C.

The two days to give notice to the inhabitants, and the four days to give in the examination are, it would seem, to be reckoned both inclusive.

Norris v. Hundred of Gawtry, Hob. 139, *et supra*.

Where the declaration upon this statute alleged that notice of the fact had been given within two days to the inhabitants of the *parish*, (instead of the *town*, *village*, or *hamlet*,) *near* the place, &c., it was holden, that it was sufficient after verdict to sustain judgment for the plaintiff; for the law intends every parish to be a vill till the contrary be shown. But, if it had been shown at the trial that the parish consisted of several vills, and that the notice had been given to one more distant than another, the defendant would have been entitled to a verdict.

Cooke v. the Hundredors of Pinhill, 8 East, 173.

The plaintiff is entitled to costs in this action, though by that means the damages should exceed 200*l*. And on the other hand, the defendants are entitled to their costs, if there be a nonsuit or verdict in their favour.

Jackson v. Inhabitants of Calesworth, 1 T. R. 71; Gretham v. Inhabitants of Theale, 3 Burr. 1723.

The notice, under the act of 9 Geo. c. 22, to some of the inhabitants of the hundred, must precede the delivery of the plaintiff's examination to the magistrate.

Fowler v. Inhabitants of the Hundred of Loninborough, 1 Taunt. and Brod. 64

Where in an action on this statute the oath proved was, that the plaintiff had *good reason to suspect* the fact was done by R G and W L, both of such a parish; it was holden, that the examination did not maintain the action. The oath required is a condition precedent, and for the sake of the hundred, and to prevent screening the offenders. There is a great deal of difference between *suspecting* and *knowing*; a man who *knows* the offender may purposely stop at the word *suspect*, to avoid being bound to prosecute; and though it be equivocating, yet it would hardly be a perjury assignable, it being only a suppression of part of the truth. He

(C) Of other Statutes giving similar Actions, &c.

should have said, *I suspect them to be the men, but I do not know it* It will be dangerous to go out of the words of the act.

King v. Inhabitants of Bishop's Sutton, 2 Str. 1247. See Thurtell v. Inhabitants of Mutford, 3 East, 400, S. P.

There are other statutes which make the hundred liable to the action of the party injured, such as 8 Geo. 2, c. 20, for destroying turnpikes, or works on navigable rivers; 10 Geo. 2, c. 32, for cutting hop-binds; 11 Geo. 2, c. 22, for destroying corn to prevent exportation; 19 Geo. 2, c. 34, for wounding officers of the customs; 29 Geo. 2, for destroying trees in newly enclosed parts of commons; 52 Geo. 3, c. 130, for pulling down, &c., buildings, engines, &c., used in trades or manufactories; and 56 Geo. 3, c. 125, for pulling down, &c., engines, bridges, buildings, &c., belonging to collieries, mines, &c.

By the 7 & 8 G. 4, c. 27, the Black act 9 G. 1, c. 22, the 8 G. 2, c. 20, as to destroying turnpikes or works on navigable rivers, the 52 G. 3, c. 130, as to pulling down buildings, engines, &c., and the 56 G. 3, c. 125, as to pulling down, &c., engines, bridges, buildings, &c., belonging to collieries, mines, &c., and the 3 G. 4, c. 33, passed for amending the laws as to recovery of damages committed by riotous assemblies, are wholly repealed; and the 1 G. 1, st. 2, c. 5, is repealed as far as it respects (*i. e.* §§ 4 & 6) the liability of hundreds, &c., for damage done by rioters; and the 10 G. 2, c. 32, is repealed, except as far as it relates to the breed of wild fowl, and the 11 G. 2, c. 22, is repealed so far as it relates to the liability of hundreds, and the 22 G. 2, c. 46, is repealed as far as it relates to writs of execution against hundreds, and the 29 G. 2, c. 36, is repealed as far as it remedies against hundreds, (*i. e.* §§ 6, 7, 8 & 9,) and the 36 G. 3, c. 9, is repealed as far as it relates to liability of hundreds, and the 57 G. 3, c. 19, is repealed as far as it relates to the liability of cities, hundreds, &c.

And by the 7 & 8 G. 4, c. 31, intituled, *An act for consolidating and amending the laws in England relative to remedies against the hundred*, it is enacted, § 2, "that if any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or movable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon-way, or trunk for conveying minerals from any mine, shall be feloniously demolished, (a) pulled down or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damaged by the offence, not only for the damage so done to any of the subjects herein-before enumerated, but also for any damage which may at the same time be done by such offenders to any fixture, furniture, or goods whatsoever, in any such church, chapel, house, or other of the buildings or erections aforesaid.

(a) It was held on the statutes 41 G. 3, c. 24, and 1 G. 1, stat. 2, c. 5, that the declaration against the hundred need not aver that the demolishing was *felonious*. *Beatson v.*

(C) Of other Statutes giving similar Actions, &c.

Rushforth, 7 Taunt. R. 45. But it would seem otherwise according to the words of this new act.

“§ 3. Provided always and be it enacted, that no action or summary proceeding as hereinafter mentioned, shall be maintainable by virtue of this act, for the damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall within seven days after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice, the names of the offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognisance before him, to prosecute the offenders when apprehended; provided also, that no person shall be enabled to bring any such action unless he shall commence the same within three calendar months after the commission of the offence.

“§ 4. And be it enacted that no process for appearance in any action to be brought against any hundred or other like district, shall be served on any inhabitant thereof, except on the high constable or some one of the high constables, (if there be more than one,) who shall within seven days after such service, give notice thereof to two justices of the peace of the county, riding, or division in which such hundred or district shall be situate, residing in or acting for the hundred or district, and such high constable is hereby empowered to cause to be entered an appearance in the said action, and also to defend the same on behalf of the inhabitants of the hundred or district, as he shall be advised, or instead of defending the same, it shall be lawful for him, with the consent and approbation of such justices, to suffer judgment to go by default; and the person upon whom as high constable the process in the action shall be served, shall notwithstanding the expiration of his office, continue to act for all the purposes of this act, until the termination of all proceedings in and consequent upon such action, but if such person shall die before such termination, the succeeding high constable shall act in his stead.

“§ 5. And be it enacted, that in any action to be brought by virtue of this act, against the inhabitants of any hundred or other like district, or against the inhabitants of any county of a city or town, or any such liberty, franchise, city, town, or place as is hereinafter mentioned, no inhabitant thereof shall by reason of any interest arising from such inhabitancy, be exempted or precluded from giving evidence either for the plaintiffs or the defendants.”

§ 6 enacts, that when the plaintiff shall recover judgment, no execution shall issue against any inhabitant, nor against the constable, but the sheriff, on receipt of the writ of execution, shall make a warrant to the treasurer of the county, commanding him to pay the sum directed to be levied, out of any public money in his hands, before the next general quarter sessions, and if there shall not be money enough in his hands, he shall give notice to the justices at sessions, who shall proceed as after mentioned.

§ 7, provides a mode of reimbursing and indemnifying the high constable and county treasurer.

§ 8, enacts that no person shall commence any action against the inhabitants of any hundred where the damage sustained shall not exceed 30*l.*, but the party damnified, shall, within seven days after the offence,

(C) Of other Statutes giving similar Actions, &c.

give notice in writing of his claim for compensation (according to the form in the schedule) to the high constable of the hundred or district; and such high constable shall, within seven days after the receipt of the notice, exhibit the same to two justices for the county or district, and they shall thereupon appoint a special petty session of all the justices of the county, &c., acting for the district or hundred, for the purpose of determining on such claim; and such high constable shall, within three days after such appointment, give notice thereof to the claimant, and within ten days, the like notice to all the justices acting for such hundred or district, and the claimant shall cause a notice to be placed on the church or chapel door, two Sundays preceding such petty session.

And by § 9, it shall be lawful for the justices, not being less than two, at such petty session or any adjournment thereof, to examine upon oath or affirmation, the claimant, and any of the inhabitants of the hundred or district, and their several witnesses, concerning such offence and damage; and thereupon the justices, if they find that the claimant has sustained damage, shall make order for payment thereof and of his costs, and also the costs of the high constable and inhabitants, (if any,) and the treasurer of the county, riding, &c., shall pay the same, and be reimbursed in manner thereinbefore directed.

The remaining sections provide for cases of damage done to churches and chapels, for cases of damage committed in counties of cities and liberties, &c., not liable to county rate.

The owner of property damaged by rioters, who has recovered the value of such damage from an insurance office, may still recover against the hundred.

Clark v. Inh. of Blything, 2 Barn. & C. 254.||

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